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CASES

ON THE LAW OF

BANKRUPTCY

INCLUDING THE LAW OF FRAUDULENT CONVEYANCES

Selected and Arranged By

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PREFACE

This collection of cases is the result of several years' work in the class-room by both of the editors. It is obvious that there are difficulties in the teaching of a subject based entirely on a statute, especially in the years immediately following the adoption of the statute, when its provisions have not yet been passed on by the courts; now, however, a considerable body of authoritative judicial interpretation of the Bankruptcy Act of 1898 has grown up, and it is hoped that the cases contained in this volume will serve to show the effective structure that has been constructed on the foundation of the Act.

Omissions from the opinions reprinted are indicated by the use of asterisks.

EVANS HOLBROOK,
RALPH W. AIGLER.

Ann Arbor, January, 1915.

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HOLBROOK & AIGLER'S

CASES ON BANKRUPTCY

CHAPTER I

JURISDICTION

SECTION I

OF THE SUBJECT MATTER

A. FEDERAL LEGISLATION

1. CONSTITUTIONAL POWER

Constitution of the United States—Article I., Section 8

The Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies throughout the United States.

2. CONSTITUTIONALITY OF BANKRUPTCY ACT

HANOVER NATIONAL BANK v. MOYSES

186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. 857

(United States Supreme Court. June 2, 1902)

Statement by Mr. Chief Justice FULLER:

This was an action brought by the Hanover National Bank of New York against Max Moyses in the circuit court of the United States for the eastern district of Tennessee, November 20, 1899, on a judgment recovered against him in the circuit court of Washington county, Mississippi, December 12, 1892.

The amended declaration averred the execution of a certain promissory note by defendant payable to the bank of Greenville,

Mississippi; the indorsement thereof to plaintiff in New York; default in payment, suit in the state court of Mississippi having jurisdiction *in personam* against defendant, who was then a citizen and resident thereof; recovery of judgment; and that the judgment "still remains in full force and effect, unappealed from, unreversed, or otherwise vacated, and the plaintiff hath not obtained any execution or satisfaction thereof." It was also averred that after the rendition of the judgment in Mississippi, defendant changed his domicil and residence to the state of Tennessee, and thereafter, "not being a merchant or a trader, nor engaged in business or in any commercial pursuits, nor using the trade of merchandise, and being without mercantile business of any kind, filed his voluntary petition in bankruptcy in the district court of the United States for the southern division of said eastern district of Tennessee, under the act of Congress of the United States of America, approved July 1st, 1898, entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States,'" and was adjudged bankrupt, and "since August 1st, 1898," "granted an adjudication of his discharge in bankruptcy from all his debts, including that herein sued for."

It was admitted that the discharge was "good and effectual if said act of Congress and the proceedings thereunder are valid," but charged that the act was void because in violation of the Federal Constitution in many particulars set forth.

Plaintiff also stated that it was and had continued to be domiciled in and resident in New York; that it was not a party to said proceedings in bankruptcy, nor did it enter its appearance therein for any purpose, nor did it prove its claim, nor did it in any way subject itself to the jurisdiction of the district court in said proceedings; that plaintiff was not served with process of any kind on said petition for adjudication, and had no notice, personal or otherwise, of the said proceeding by voluntary petition for adjudication; nor was any notice of the proceeding to adjudicate defendant a bankrupt given plaintiff, or anyone else, "nor is any notice of any kind of such proceeding to adjudicate a person a bankrupt upon his voluntary petition required by said act of Congress, and in this said act of Congress violates the Fifth Amendment," as does the "adjudication of defendant as a bankrupt;" that the situs of the promissory note, on which the judgment was rendered, was never within the jurisdiction of the district court; and that

the court never acquired jurisdiction of plaintiff, nor of the debt sued on.

Demurrer was filed to the amended declaration, the demurrer sustained, and final judgment entered dismissing the suit. The circuit court stated that it took this action on the authority of Leidigh Carriage Co. v. Stengel, 37 C. C. A. 210, 95 Fed. 637. Thereupon the bank brought this writ of error.

Errors were specified as follows: That the discharge under the act of Congress of July 1, 1898, was a nullity, because:

"1. Said act violates the 5th Amendment to the Constitution of the United States in this:

"(a) It does not provide for notice as required by due process of law to the creditor in voluntary proceedings for adjudication of bankruptcy and for the discharge of the debt of the creditor.

"(b) Ten days' notice by mail to creditors to oppose discharge is so unreasonably short as to be a denial of notice.

"(c) The grounds of opposition to a discharge are so unreasonably limited as, substantially, to deny the right of opposition to a discharge. Thereby the act is also practically a legislative promulgation of a discharge contrary to art. 3, § 1, of the Federal Constitution.

"2. Said act violates art. 1, § 8, ¶ 4, of the Constitution in this:

"(a) It does not establish uniform laws on the subject of bankruptcies throughout the United States.

"(b) It delegates certain legislative powers to the several states in respect to bankruptcy proceedings.

"(c) It provides that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions."

Mr. Chief Justice FULLER delivered the opinion of the court:

By the 4th clause of § 8 of art. 1 of the Constitution the power is vested in Congress "to establish * * * uniform laws on the subject of bankruptcies throughout the United States." This power was first exercised in 1800. 2 Stat. at L. 19, c. 19. In 1803 that law was repealed. 2 Stat. at L. 248, c. 6. In 1841 it was again exercised by an act which was repealed in 1843. 5 Stat. at L. 440, c. 9; 5 Stat. at L. 614, c. 82. It was again exercised in 1867 by an act which, after being several times amended, was finally repealed in 1878. 14 Stat. at L. 517,

c. 176; 20 Stat. at L. 99, c. 160. And on July 1, 1898, the present act was approved.

The act of 1800 applied to "any merchant, or other person, residing within the United States, actually using the trade of merchandise, by buying or selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer," and to involuntary bankruptcy.

In Adams v. Storey, 1 Paine, 79, Fed. Cas. No. 66, Mr. Justice Livingston said on circuit: "So exclusively have bankrupt laws operated on traders, that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation to this subject." But this doubt was resolved otherwise, and the acts of 1841 and 1867 extended to persons other than merchants or traders, and provided for voluntary proceedings on the part of the debtor, as does the act of 1898.

It is true that from the first bankrupt act passed in England, 34 & 35 Hen. VIII. c. 4, to the days of Queen Victoria, the English bankrupt acts applied only to traders, but, as Mr. Justice Story, in his Commentaries on the Constitution, pointed out, "this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors." § 1113.

The whole subject is reviewed by that learned commentator in c. XVI. §§ 1102 to 1115 of his work, and he says (§ 1111) in respect of "what laws are to be deemed bankrupt laws within the meaning of the Constitution:" "Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said that laws which merely liberate the person of the debtor are insolvent laws, and those which discharge the contract are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. * * * Again, it has been said that insolvent laws act on imprisoned debtors only at their own instance, and bankrupt laws only at the instance of creditors. But, however true this may have been in past times, as the actual course of English legislation, it is not true, and never was true, as a distinction in colonial legislation. In England it was an accident in the system, and not a material ground to discriminate, who were to be deemed in a legal sense insolvents,

or bankrupts. And if an act of Congress should be passed, which should authorize a commission of bankruptcy to issue at the instance of the debtor, no court would on this account be warranted in saying that the act was unconstitutional, and the commission a nullity. It is believed that no laws ever were passed in America by the colonies or states, which had the technical denomination of 'bankrupt laws.' But insolvent laws, quite coextensive with the English bankrupt system in their operations and objects, have not been unfrequent in colonial and state legislation. No distinction was ever practically, or even theoretically, attempted to be made between bankruptcies and insolvencies. And a historical review of the colonial and state legislation will abundantly show that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to bankrupt laws."

Sturges v. Crowninshield, 4 Wheat. 122, 195, 4 L. ed. 529, 548, was cited, where Chief Justice Marshall said: "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion. This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law."

In the case, Re Klein, Fed. Cas. No. 7,865, decided in the circuit court for the district of Missouri, and reported in a note to Nelson v. Carland, 1 How. 265, 277, 11 L. ed. 126, 130, Mr. Justice Catron held the bankrupt act of 1841 to be constitutional, although it was not restricted to traders, and allowed the debtor to avail himself of the act on his own petition, differing in these particulars from the English acts. He said, among other things: "In considering the question before me, I have not pretended to give a definition, (but purposely avoided any attempt to define) the mere word 'bankruptcy.' It is employed in the Constitution in the plural, and as part of an expression, 'the subject of bankruptcies.' The ideas attached to the word in this connection are numerous and complicated; they form a subject of extensive and complicated legislation; of this sub-

ject, Congress has general jurisdiction; and the true inquiry is,—To what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject,—distribution and discharge,—are in the competency and discretion of Congress. With the policy of a law letting in all classes, —others as well as traders,—and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the lawmakers."

Similar views were expressed under the act of 1867, by Mr. Justice Blatchford, then District Judge, in Re Reiman, 7 Ben. 455, Fed. Cas. No. 11,673; by Deady, J., in Re Silverman, 1 Sawy. 410, Fed. Cas. No. 12,855; by Hoffman, J., in Re California P. R. Co., 3 Sawy. 240, Fed. Cas. No. 2,315; and in Kunzler v. Kohaus, 5 Hill, 317, by Cowen, J., in respect of the act of 1841, in which Mr. Justice Nelson, then Chief Justice of New York, concurred. The conclusion that an act of Congress establishing a uniform system of bankruptcy throughout the United States is constitutional, although providing that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions, is really not open to discussion.

The framers of the Constitution were familiar with Blackstone's Commentaries, and with the bankrupt laws of England, yet they granted plenary power to Congress over the whole subject of "bankruptcy," and did not limit it by the language used. This is illustrated by Mr. Sherman's observation in the Convention, that "bankruptcies were, in some cases, punishable with death by the laws of England, and he did not choose to grant a power by which that might be done here;" and the rejoinder of Gouverneur Morris, that "this was an extensive and delicate subject. He would agree to it, because he saw no danger of abuse of the power by the legislature of the United States." Madison Papers, 5 Elliot, 504; 2 Bancroft, 204. And also to some extent by the amendment proposed by New York, "that the power of Congress to pass uniform laws concerning bankruptcy shall only extend to merchants and other traders; and the states, respectively, may pass laws for the relief of other insolvent debtors." 1 Elliot, 330. See also Mr. Pinkney's

original proposition, 5 Elliot, 488; the report of the committee thereon, 5 Elliot, 503; and The Federalist, No. 42, Ford's ed. 279.

As the states, in surrendering the power, did so only if Congress chose to exercise it, but in the absence of congressional legislation retained it, the limitation was imposed on the states that they should pass no "law impairing the obligation of contracts."

In Brown v. Smart, 145 U. S. 454, 457, 36 L. ed. 773, 775, 12 Sup. Ct. Rep. 958, 959, Mr. Justice Gray said: "So long as there is no national bankrupt act, each state has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a state cannot by such a law discharge one of its own citizens from his contracts with citizens of other states, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency. * * * Yet each state, so long as it does not impair the obligation of any contract, has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction." Many cases were cited, and, among others, Denny v. Bennett, 128 U. S. 498, 32 L. ed. 494, 9 Sup. Ct. Rep. 134, where Mr. Justice Miller observed: "The objection to the extraterritorial operation of a state insolvent law is that it cannot, like the bankruptcy law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the state, so far as it does not impair the obligation of contracts, is conceded."

Counsel justly says that "the relation of debtor and creditor has a dual aspect, and contains two separate elements. The one is the right of the creditor to resort to present property of the debtor through the courts to satisfy the debt; the other is the personal obligation of the debtor to pay the debt, and that he will devote his energies and labor to discharge it" (4 Wheat. 198, 4 L. ed. 549); and, "in the absence of property, the personal obligation to pay constitutes the only value of the debt." Hence the importance of the distinction between the power of Congress and the power of the states. The subject of "bankruptcies" includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the states were forbidden to do.

The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical, and not personal, and we do not think that the provision of the act of 1898 as to exemptions is incompatible with the rule.

Section 6 reads: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicil for the six months, or the greater portion thereof, immediately preceding the filing of the petition." [30 Stat. at L. 544, c. 541.]

Section 14 of the act of 1867 prescribed certain exemptions, and then added: "And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four." [14 Stat. at L. 517, c. 176.] This was subsequently amended, and controversies arose under the act as amended which we need not discuss in this case. Lowell, Bankruptcy, § 4.

It was many times ruled that this provision was not in derogation of the limitation of uniformity because all contracts were made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets. Mr. Justice Miller concurred in an opinion to that effect in the Case of Beckerford, 1 Dill. 45, Fed. Cas. No. 1,209.

Mr. Chief Justice Waite expressed the same opinion in Re Deckert, 2 Hughes, 183, Fed. Cas. No. 3,728. The Chief Justice there said: "The power to except from the operation of the law property liable to execution under the exemption laws of the several states, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time

being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution."

We concur in this view, and hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each state whatever would have been available to the creditor if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states.

Nor can we perceive in the recognition of the local law in the matter of exemptions, dower, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power. Re Rahrer, 140 U. S. 545, 560, *sub nom.* Wilkerson v. Rahrer, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865.

But it is contended that as to voluntary proceedings the act is in violation of the 5th Amendment in that it deprives creditors of their property without due process of law in failing to provide for notice.

The act provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt" (§ 4a), and that "upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition." § 18g. With the petition he must file schedules of his property, and "of his creditors, showing their residences, if known, if unknown, that fact to be stated." § 7, subd. 8. The schedules must be verified, and the petition must state that "petitioner owes debts which he is unable to pay in full," and "that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law." This establishes those facts so far as a decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition. These are not issuable facts, and notice is unnecessary, unless dismissal is sought, when notice is required. § 59g.

As Judge Lowell said: "He may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes

him at his word, and makes effectual provision, not only by civil, but even by criminal, process to effectuate his alleged intent of giving up all his property." Re Fowler, 1 Low. Dec. 161, Fed. Cas. No. 4,998.

Adjudication follows as matter of course, and brings the bankrupt's property into the custody of the court for distribution among all his creditors. After adjudication the creditors are given at least ten days' notice by publication and by mail of the first meeting of creditors, and of each of the various subsequent steps in administration. § 58. Application for a discharge cannot be made until after the expiration of one month from adjudication. § 14.

Form No. 57 gives the form of petition for discharge and the order for hearing to be entered thereon, requiring notice to be published in a designated newspaper printed in the district, and "that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated."

Section 14b provides for the granting of discharge unless the applicant has "(1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and, in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

The offenses referred to are enumerated in § 29, and embrace misappropriation of property; concealing property belonging to the estate; making false oaths or accounts; presenting false claims; receiving property from a bankrupt with intent to defeat the act; extorting money for acting or forbearing to act in bankruptcy proceedings.

It is also provided by § 15 that a discharge may be revoked, on application within a year, if procured by fraud and not warranted by the facts.

Notwithstanding these provisions, it is insisted that the want of notice of filing the petition is fatal because the adjudication *per se* entitles the bankrupt to a discharge, and that the proceedings in respect of discharge are *in personam*, and require personal service of notice. The adjudication does not in itself have that effect, and the first of these objections really rests on the ground that the notice provided for is unreasonably short, and the right to oppose discharge unreasonably restricted. Con-

sidering the plenary power of Congress, the subject-matter of the suit, and the common rights and interests of the creditors, we regard the contention as untenable.

Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law, and we cannot find anything in this act on that subject which would justify us in overthrowing its action.

Nor is it possible to concede that personal service of notice of the application for a discharge is required.

Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*, as Mr. Justice Grier remarked in Shawhan v. Wherritt, 7 How. 643, 12 L. ed. 854. And in New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 662, 23 L. ed. 339, it was ruled that a decree adjudging a corporation bankrupt is in the nature of a decree *in rem* as respects the status of the corporation. Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicil. If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree.

Judgment affirmed.

B. State Legislation

1. Effect of National Act

Note.—In the absence of a national bankruptcy statute it is within the power of the several states to enact such legislation. Sturges v. Crowninshield, 4 Wheat. 122. State bankruptcy laws, however, in so far as they purport to affect contracts made before the adoption of the statutes are void as impairing the obligation of contracts. Sturges v. Crowninshield, *supra*. As to contracts made after the enactment of the state

bankruptcy statute there is no constitutional objection to the state law providing for a full and complete discharge. Ogden v. Saunders, 12 Wheat. 213. During the times when there was no national bankruptcy law, when the several states had covered the ground more or less fully, many interesting and difficult problems confronted the courts as to the proper law applicable to given cases. The problem usually presented was the effect of a discharge by a state court under the state statute upon contracts made in other states or held by creditors who were non-residents or citizens of other states. For a discussion of this very interesting though now comparatively unimportant problem see 6 Harv. L. Rev. 349.

Upon the national act taking effect, state statutes covering the same or part of the same ground (see *infra,* 12-41) are *ipso facto* suspended; and upon the repeal of the national act they are *ipso facto* revived. Lothrop v. Highland Foundry Co., 128 Mass. 120; Oil Co. v. Morse & Co., 97 Ark. 513. In Maine an insolvency act was passed before the repeal of the national act of 1867, and it was held that upon the repeal of the federal statute the state law became operative and covered things done during the time that the state and federal laws overlapped. Palmer v. Hixon, 74 Me. 447. See also Lothrop v. Highland Foundry Co., *supra.*

2. WHAT STATE LAWS ARE SUSPENDED

MAYER v. HELLMAN

91 U. S. 496, 23 L. ed. 377

(United States Supreme Court. January 31, 1876)

Hellman, as assignee in bankruptcy of Bogen and others, sued Mayer and Evans, assignees of the same parties under the assignment laws of the State of Ohio, to obtain property which passed to defendants under the assignment to them. The defendants answered, setting up their title under the assignment; and the plaintiffs demurred to the answer. The Court below sustained the demurrer, and the defendants sue out their writ of error.

The facts as disclosed by the record, so far as they are material for the disposition of the case, are briefly these: On the 3rd of December, 1873, at Cincinnati, Ohio, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the same

parties with Henry Muller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners, assigned certain property held by them, including that in controversy, to three trustees, in trust for the equal and common benefit of all their creditors. The deed was delivered upon its execution, and the property taken possession of by the assignees.

By the law of Ohio, in force at the time, when an assignment of property is made to trustees for the benefit of creditors, it is the duty of the trustees, within ten days after the delivery of the assignment to them, and before disposing of any of the property, to appear before the probate judge of the county in which the assignors reside, produce the original assignment, or a copy thereof, and file the same in the Probate Court, and enter into an undertaking payable to the State, in such sum and with such sureties as may be approved by the judge, conditioned for the faithful performance of their duties.

In conformity with this law, the trustees, on the 13th of December, 1873, within the prescribed ten days, appeared before the probate judge of the proper county in Ohio, produced the original assignment, and filed the same in the Probate Court. One of the trustees having declined to act, another one was named in his place by the creditors, and appointed by the Court. Subsequently the three gave an undertaking with sureties approved by the judge, in the sum of $500,000, for the performance of their duties, and then proceeded with the administration of the trust under the direction of the Court.

On the 22nd of June of the following year, more than six months after the execution of the assignment, the petition in bankruptcy against the insolvents was filed in the District Court of the United States, initiating the proceedings in which the plaintiff was appointed their assignee in bankruptcy. As such officer, he claims a right to the possession of the property in the hands of the defendants under the assignment to them. Judgment having been rendered against them, they sued out this writ of error.

Mr. Justice FIELD delivered the opinion of the Court.

The validity of the claim of the assignee in bankruptcy depends, as a matter of course, upon the legality of the assignment made under the laws of Ohio. Independently of the Bankrupt Act, there could be no serious question raised as to its

legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed not only a legal proceeding, but one entitled to commendation. Creditors have a right to call for the application of the property of their debtor to the satisfaction of their just demands; but, unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hindrance and delay to particular creditors, in their efforts to reach before others the property of the debtor, that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction.

The great object of the Bankrupt Act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose, it sets aside all transactions had within a prescribed period previous to the petition in bankruptcy, defeating, or tending to defeat, such distribution. It reaches to proceedings of every form and kind undertaken or executed within that period by which a preference can be secured to one creditor over another, or the purpose of the act evaded. That period is four months for some transactions, and six months for others. Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the Bankrupt Act.

Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy. Unless, therefore, a transaction is void against creditors independently of the provisions of the Bankrupt Act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute an-

terior to the proceedings in bankruptcy. The assignment in this case was not a proceeding, as already said, in hostility to the creditors, but for their benefit. It was not, therefore, void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the assignee in bankruptcy, a closed proceeding.

The counsel of the plaintiffs in error have filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the Bankrupt Act, though made within six months previous to the filing of the petition. Their argument is, that such an assignment is only a voluntary execution of what the Bankrupt Court would compel; and as it is not a proceeding in itself fraudulent as against creditors, and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late Mr. Justice Nelson, in the Circuit Court of New York, in Sedgwick v. Place, First Nat. Bank. Reg. 204, and of Mr. Justice Swayne in the Circuit Court of Ohio, in Langley v. Perry, 2 Nat. Bank. Reg. 180. Certain it is that such an assignment is not absolutely void; and, if voidable, it must be because it may be deemed, perhaps, necessary for the efficiency of the Bankrupt Act that the administration of an insolvent's estate shall be intrusted to the direction of the District Court, and not left under the control of the appointee of the insolvent. It is unnecessary, however, to express any decided opinion upon this head; for the decision of the question is not required for the disposition of the case.

In the argument of the counsel of the defendant in error, the position is taken that the Bankrupt Act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that the statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments: it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the con-

veyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment: it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the Bankrupt Law of Congress suspends all proceedings under the Insolvent Law of the State, has no application.

The assignment in this case being in our judgment valid and binding, there was no property in the hands of the plaintiffs in error which the assignee in bankruptcy could claim. The assignment to them divested the insolvents of all proprietary rights they held in the property described in the conveyance. They could not have maintained any action either for the personalty or realty. There did, indeed, remain to them an equitable right to have paid over to them any remainder after the claims of all of the creditors were satisfied. If a contingency should ever arise for the assertion of this right, the assignee in bankruptcy may perhaps have a claim for such remainder, to be applied to the payment of creditors not protected by the assignment, and whose demands have been created subsequent to that instrument. Of this possibility we have no occasion to speak now.

Our conclusion is, that the Court below erred in sustaining the demurrer to the defendant's answer; and the judgment of the Court must, therefore, be reversed, and the cause remanded for further proceedings.[1]

BOESE v. KING

108 U. S. 379, 27 L. ed. 760

(United States Supreme Court. April 30, 1883)

Suit by a receiver appointed by a State court in New York on return of execution unsatisfied; brought in New York against

1—*Acc.* In re Farrell, 176 Fed. 505, 100 C. C. A. 63; Pogue v. Rowe, 236 Ill. 157 (but see Harbaugh v. Costello, 184 Ill. 110). See also Downer v. Porter, 116 Ky. 422, 76 S. W. 135; Louisville Co. v. Lamman, 135 Ky. 163, 121 S. W. 1042.

assignees of the property of the judgment debtor under an assignment for the benefit of creditors, made in accordance with the laws of New Jersey (of which State the assignees and the debtor are citizens), and to recover proceeds of the debtor's property voluntarily brought within the State of New York by the assignees for distribution under the assignment.

By deed of assignment executed and delivered September 25th, 1873, Wm. H. Locke, a citizen of New Jersey, transferred and conveyed to Wm. King, John M. Goetchius, and Edward E. Poor, and the survivor of them, and their and his heirs and assigns, all his property of every kind and description—except such as was exempt by law from execution—"in trust to take possession of and collect and to sell and dispose of the same at public or private sale in their discretion, and to distribute the proceeds to and among the creditors of the said Wm. H. Locke, in proportion to their several just demands, pursuant to the statutes in such case made and provided, and on the further trust to pay the surplus, if any there be, after fully satisfying and paying the said creditors and all proper costs and charges, to the said Wm. H. Locke."

The intention of Locke and the assignors [assignees] was to have a distribution made among the creditors of the former in conformity with the requirements of an act of the legislature of New Jersey, passed April 16th, 1846, entitled "An Act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors."

That act provided, among other things, that every conveyance or assignment by a debtor of his estate, real or personal or both, in trust, to an assignee for the benefit of creditors, shall be made for their equal benefit in proportion to their several demands to the net amount that shall come to the hands of the assignee for distribution; and all preferences of one creditor over another, or whereby one shall be first paid or have a greater proportion in respect to his claim than another, shall be deemed fraudulent and void, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose by preferring creditors (1); further, that the debtor shall annex to his assignment an inventory, under oath or affirmation, of all of his property, together with a list of his creditors, and the amount of their respective claims, such inventory not, however, to be conclusive as to the quantity of the debtor's estate, and the assignee to be entitled to any other

property belonging to the debtor at the time of the assignment, and comprehended within its general terms (2). Other sections provided for public notice by the assignee of the assignment; for the presentation of claims of creditors; for filing by the assignee under oath of a true inventory and valuation of the estate; for the execution by him of a bond in double the amount of such inventory or valuation; for the recording of such bond; for the filing with the clerk of the Court of Common Pleas of the county of the debtor's residence, within three months after the date of the assignment, of a list of all such creditors as claim to be such, and the amount of their demands, first making it known by advertisement that all claims against the estate must be made as prescribed in the statute, or be forever barred from coming in for a dividend of said estate, otherwise than as provided; for the right of the assignee or any creditor or person interested to except to the allowance of any claim presented; for the adjudication of such exceptions for fair and equal dividends from time to time among the creditors of the assets in proportion to their respective claims; and for a final accounting by the assignee in the Orphans' Court of the county—such settlement and adjudication to be conclusive on all parties, except for assets which may afterward come to hand, or for frauds or apparent error (3, 4, 5, 6 and 7).

The act further provided

"11. If any creditor shall not exhibit his, her or their claims within the term of three months as aforesaid, such claim shall be barred of a dividend unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, or such creditors shall find some other estate not accounted for by the assignee or assignees before distribution, in which case such barred creditors shall be entitled to a ratable proportion therefrom.

"12. Whenever any assignee or assignees, as aforesaid, shall sell any real estate of such debtor or debtors as is conveyed in trust as aforesaid, he or they shall proceed to advertise and sell the same in manner as is now or may hereafter be prescribed in the case of an executor or administrator directed to sell lands by an order of the Orphans' Court for the payment of the debts of the testator or intestate.

"13. Every assignee, as aforesaid, shall have as full power and authority to dispose of all estate, real and personal, assigned, as the said debtor or debtors had at the time of the

assignment, and to sue for and recover in the proper name of such assignee or assignees everything belonging or appertaining to said estate, real or personal, of said debtor or debtors, and shall have full power and authority to refer to arbitration, settle and compound, and to agree with any person concerning the same, and to redeem all mortgages and conditional contracts, and generally to act and do whatever the said debtor or debtors might have lawfully done in the premises.

"14. Nothing in this act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims either in regard to the persons of such debtors or to any estate, real or personal, not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid for a dividend, they shall be wholly barred from having afterward any action or suit at law or equity against such debtors or their representatives, unless on the trial of such action or hearing in equity the said creditor shall prove fraud in the said debtor or debtors with respect to the said assignment, or concealing his estate, real or personal, whether in possession, held in trust, or otherwise."

The estate which came into the hands of the assignees was converted into money in New Jersey—the amount being nearly $200,000—and the proceeds, for the convenience of the assignees, were deposited in a bank in the city of New York. No proceedings in bankruptcy were ever taken against Locke.

On the 3rd day of February, 1876, William Pickhardt and Adolph Kutroff recovered a judgment against Locke in the Supreme Court of the city and county of New York for $3,086.85. Upon that judgment execution was issued and returned unsatisfied. Subsequently, May 27th, 1876, in certain proceedings, before one of the judges of that court, supplementary to the return of execution, Thomas Boese, plaintiff in error, was appointed receiver of the property of Locke, and having executed a bond for the faithful discharge of the duties of his trust, he obtained an order from the same court giving him authority, as receiver, to bring an action against the assignees of Locke. Thereupon, June 9th, 1876, he commenced this action. It proceeds upon these grounds: 1. That the indebtedness from Locke to Pickhardt and Kutroff arose in New York, where they reside, before the making of said assignment; 2. That the statute of New Jersey with reference to or under which said

assignment was made was, by force of the Bankruptcy Act of 1867, suspended and of no effect; 3. That the assignment was fraudulent and void by the laws of New Jersey, in that it was made with the intent upon the part of Locke to hinder, delay and defraud his creditors, and in that he had a large amount of money and other property which he fraudulently retained to his own use and did not surrender to the assignees.

The prayer of the complaint—the allegations of which were fully met by answer—was for judgment against the defendants; that the assignments be adjudged fraudulent and void; and that the defendants be required to account to plaintiff for all the property and money received or to which they are entitled under and by virtue of the assignment. It was conceded at the hearing that defendants had in their hands, of the proceeds of the sale of the assigned property, an amount sufficient to pay the judgment of Pickhardt and Kutroff.

The Supreme Court of New York, both in general and special terms, sustained the action and gave judgment against the assignees in favor of Boese, as receiver, for the amount of the demand of Pickhardt and Kutroff. But in the Court of Appeals that judgment was reversed, with directions to enter judgment for the defendants.

The receiver brought the suit here in error asking to have this decision reversed.

Mr. Justice HARLAN delivered the opinion of the Court. After reciting the facts in the foregoing language he continued: We are to consider in this case whether the final judgment of the Court of Appeals of New York has deprived the plaintiff in error of any right, title, or privilege under the Constitution or laws of the United States.

We dismiss from consideration all suggestions in the pleadings of actual fraud upon the part either of Locke or of his assignees. The court of original jurisdiction found as a fact—and upon that basis the case was considered by the Court of Appeals—that the assignment was executed and delivered by the former and accepted by the latter in good faith and without any purpose to hinder, delay, or defraud any creditor of Locke. It is further found as a fact that the assignment was made with the intent, *bona fide*, to make an equal distribution of the proceeds of the trust estate among creditors, in conformity with the local statute. The Supreme Court of New York ruled that

the statute of New Jersey was, in its nature and effect, a bankrupt law, and the power conferred upon Congress to establish a uniform system of bankruptcy, having been exercised by the passage of the act of 1867, the latter act wholly suspended the operation of the local statute as to all cases within its purview; consequently, it was held, the assignment was not valid for any purpose. The Court of Appeals, recognizing the paramount nature of the Bankrupt Act of Congress, and assuming that the 14th section of the New Jersey statute, relating to the effect upon the claims of creditors who exhibit their demands for a dividend, was inconsistent with that act and therefore inoperative, adjudged that other portions of the local statute providing for the equal distribution of the debtor's property among his creditors, and regulating the general conduct of the assignee, were not inconsistent with nor were they necessarily suspended by the act of 1867; further, that the New Jersey statute did not create the right to make voluntary assignments for the equal benefit of creditors, but was only restrictive of a previously existing right, and imposed, for the benefit of creditors, salutary safeguards around its exercise; consequently, had the whole of the New Jersey statute been superseded, the right of a debtor to make a voluntary assignment would still have existed. The assignment, as a transfer of the debtor's property, was, therefore, upheld as in harmony with the general object and purposes of the Bankrupt Act, unassailable by reason merely of the fact that some of the provisions of the local statute may have been suspended by the act of 1867.

In the view which we take of the case it is unnecessary to consider all of the questions covered by the opinion of the state court and discussed here by counsel. Especially it is not necessary to determine whether the Bankrupt Act of 1867 suspended or superseded all of the provisions of the New Jersey statute. Undoubtedly the local statute was, from the date of the passage of the Bankrupt Act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and claimed to participate in the distribution of the proceeds of the assigned property. It is equally clear, we think, that the assignment by Locke of his entire property to be disposed of as prescribed by the statute of New Jersey, and therefore independently of the bankruptcy court, constituted, itself, an act of bankruptcy, for which, upon the petition of a creditor filed in proper time,

Locke could have been adjudged a bankrupt, and the property wrested from his assignees for administration in the bankruptcy court. In Re Burt, 1 Dillon, 439, 440; in Re Goldschmidt, 3 Bank. Reg. 164; In matter of Seymour T. Smith, 4 Bank. Reg. 377. The claim of Pickhardt and Kutroff existed at the time of the assignment. The way was, therefore, open for them by timely action, to secure the control and management of the assigned property by that court for the equal benefit of all the creditors of Locke. But they elected to lie by until after the expiration of the time within which the assignment could be attacked under the provisions of the Bankrupt Act; and now seek, by this suit in the name of the plaintiff in error, to secure an advantage or preference over all others; this, notwithstanding the assignment was made without any intent to hinder, delay, or defraud creditors. In order to obtain that advantage or preference, the plaintiff in error relies on the paramount force of the Bankrupt Act, the primary object of which, as this Court has frequently announced, was to secure equality among the creditors of a bankrupt. Mayer v. Hellman, 91 U. S. 496-501; Reed v. McIntyre, 98 U. S. 507-509; Buchanan v. Smith, 16 Wall. 277. It can hardly be that the Court is obliged to lend its aid to those who, neglecting or refusing to avail themselves of the provisions of the act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure. If it be assumed, for the purposes of this case, that the statute of New Jersey was, as to each and all of its provisions, suspended when the Bankrupt Act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly, that instrument was sufficient to pass the title from Locke to his assignees. It was good as between them, at least until Locke, in some appropriate mode, or by some proper proceedings, manifested a right to have it set aside or canceled upon the ground of a mutual mistake in supposing that the local statute of 1846 was operative. And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property and distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute. The assignment was not void as between the debtor and the assignees simply because it provided for the distribution

of the proceeds of the property in pursuance of a statute, none of the provisions of which, it is claimed, were then in force. Had this suit been framed for the purpose of compelling the assignees to account to all the creditors for the proceeds of the sale of the property committed to their hands, without discrimination against those who did not recognize the assignment and exhibit their demands within the time and mode prescribed by the New Jersey statute, a wholly different question would have been presented for determination. It has been framed mainly upon the idea that by reason of the mistake of Locke and his assignees in supposing that the property could be administered under the provisions of the local statute of 1846, even while the Bankrupt Act was in force, the title did not pass for the benefit of creditors according to their respective legal rights. In this view, as has been indicated, we do not concur.

We are of opinion that, except as against proceedings instituted under the Bankrupt Act for the purpose of securing the administration of the property in the bankruptcy court, the assignment, having been made without intent to hinder, delay, or defraud creditors, was valid, for at least the purpose of securing an equal distribution of the estate among all the creditors of Locke, in proportion to their several demands, Reed v. McIntyre, 98 U. S. 507-509; and, consequently, we adjudge only that the plaintiff in error is not entitled, by reason of any conflict between the local statute and the Bankrupt Act of 1877 [1867] or by force of the before-mentioned judgment and the proceedings thereunder, to the possession of the assigned property or of its proceeds, as against the assignees, or to a priority of claim for the benefit of Pickhardt and Kutroff upon such proceeds. *The judgment is affirmed.*

Mr. Justice MATTHEWS (with whom concurred MILLER, GRAY, and BLATCHFORD, JJ.), dissenting.

Mr. Justice MILLER, Mr. Justice GRAY, Mr. Justice BLATCHFORD, and myself, are unable to agree with the opinion and judgment of the court in this case. The grounds of our dissent may be very generally and concisely stated as follows:

The New Jersey statute of April 16th, 1846, the validity and effect of which are in question, is an insolvent or bankrupt law,

which provides for the administration of the assets of debtors who make assignments of all their assets to trustees for creditors, and for their discharge from liabilities to creditors sharing in the distribution. It was accordingly in conflict with the National Bankrupt Act of 1867 when the latter took effect, and from that time became suspended and without force until the repeal of the act by Congress. It is conceded that the 14th section, which provides for the discharge of the debtor, is void by reason of this conflict, and, in our opinion, this carries with it the entire statute. For the statute is an entirety, and, to take away the distinctive feature contained in the 14th section, destroys the system. It is not an independent provision, but an inseparable part of the scheme contained in the law.

This being so, the assignment in the present case must be regarded as unlawful and void as to creditors. For it was made in view of this statute and to be administered under it. Such is the express recital of the instrument and the finding of the fact by the court. It is as if the provisions of the act had been embodied in it and it had declared expressly that it was executed with the proviso that no distribution should be made of any part of the debtor's estate to any creditor except on condition of the release of the unpaid portion of his claim.

It is not possible, we think, to treat the assignment as though the law of the state in view of which it was made, and subject to the provisions of which it was intended to operate, had never existed, or had been repealed before its execution. Because there is no reason to believe that, in that state of the case, the debtor would have made an assignment on such terms. To do so is to construct for him a contract which he did not make and which there is no evidence that he intended to make. It must be regarded, then, as a proceeding under the statute of New Jersey, and as such, with that statute, made void, as to creditors, by the National Bankrupt Act of 1867. Otherwise that uniform rule as to bankruptcies, which it was the policy of the Constitution and of the act of Congress pursuant to it, to provide, would be defeated. No title under it, therefore, could pass to the defendants in error, and the judgment creditors who acquired a lien upon the fund in their hands were by law entitled to appropriate it, as the property of their debtor, to the payment of their claims.

For these reasons we are of opinion that the judgment of the Court of Appeals of New York should be reversed.

HAWKINS & CO. v. LEARNED

54 N. H. 333

(Supreme Judicial Court of New Hampshire. June, 1874)

Assumpsit, by L. B. Hawkins & Co. against Lewis M. Learned, to recover the amount of a promissory note, and for goods sold and delivered. Writ dated October 24, 1873. December 23, 1873, the defendant was duly decreed to be an insane person by the probate court for Merrimack county, and John C. Smith was appointed his guardian. March 24, 1874, upon the representation of said guardian, said probate court decreed said estate insolvent, and appointed John M. Shirley commissioner of insolvency.

At the April term, 1874, said guardian appeared specially by his attorney, E. B. S. Sanborn, Esq., and moved that this action be dismissed by reason of said proceedings in the probate court; and the questions arising on said motion were reserved for the consideration of the whole court.

SARGENT, C. J. The motion to dismiss in this case is founded upon Gen. Stats., c. 167, § 10, as follows: "When, upon representation of the guardian of any insane person or spendthrift, the judge is satisfied that estate of the ward is not sufficient to discharge the just debts due therefrom, he may decree that said estate be settled as insolvent, and thereupon such proceedings shall be had, decrees made, appeals allowed, suits disposed of, and the accounts of the guardian adjusted, as in the case of insolvent estates of deceased persons."

In this case, it is agreed that the defendant was duly decreed to be an insane person by the probate court, and a guardian was appointed. The guardian made the proper representation to the probate court, and the defendant's estate was thereupon decreed to be administered as insolvent; and after this, at this term, the guardian appears and moves that this action, which was commenced October 24, 1873, be dismissed in consequence of such proceedings in the probate court.

This is the same way a suit would be disposed of in case of a deceased person whose estate was decreed to be administered as insolvent. No action shall be commenced or prosecuted against an administrator after the estate is decreed to be administered as insolvent, but the cause of action may be pre-

sented to the commissioner and allowed, with the costs of any action pending at the time of such decree—Gen. Stats., c. 179, § 8; and in such cases no plea is necessary setting forth the decease or the insolvency. When the facts are suggested, and the court is satisfied that such decrees have been made in the court of probate, the actions are discontinued in this court at once.

It is urged in argument that the plaintiffs should be heard upon the question whether the party is insane, etc.; but that could not be in this court. The probate court is the tribunal selected by law to settle that question; and, when once settled there, it is settled for all other places and all other courts. This must be so from the nature of the case. If it were not so, the same man might be held both sane and insane at the same time. The case of Jones v. Jones, 45 N. H. 123, is directly in point, under provisions of the statute precisely like the present, and must control this case.

The authorities cited, that the general bankrupt law of the United States supersedes all state insolvent laws, do not apply. The laws for the settlement of the estates of deceased persons though they may provide for settling estates in the insolvent course, yet are not regarded as general insolvent laws. It would not be claimed, probably, that the statute for the settlement of the estates of deceased persons in the insolvent course was superseded by the general bankrupt law; and if not, then this would not be, because this statute provides for settling the estates of insane persons in all respects like the settling of the estates of persons deceased.

The motion to dismiss must be granted.

JOHNSON v. CRAWFORD et al.

154 Fed. 761

(United States Circuit Court, Middle District, Pennsylvania. March 15, 1907)

ARCHBALD, District Judge. On January 11, 1906, the plaintiff recovered a judgment of $27,710.60 against the defendants in an action of assumpsit for timber sold; and, having failed to obtain satisfaction by execution, on December 20, 1906, filed an affidavit charging, in substance, that the defendants had money and property which they fraudulently concealed and refused to apply to the payment of the judgment, and there-

upon secured a warrant of arrest under the act of assembly of July 12, 1842 (P. L. Pa. 339). Upon this, one of the defendants, Crawford, was apprehended, and, having been brought into court, has moved to quash the writ upon the ground that in the present state of the law it is not authorized; the right to file a bond to take the benefit of the insolvent laws of the state being an essential part of the proceedings, and, having been suspended by the passage by Congress of the bankruptcy act of 1898, the right to the writ falls with it. The motion is justified by the case of Commonwealth v. O'Hara, 6 Phila. 402, where it was held that a warrant of arrest under the act of 1842 could not be prosecuted in the face of the existing bankruptcy law, the insolvent laws of the state being thereby made inoperative. But it was held, on the other hand, in Gregg v. Hilsen, 12 Phila. 348, by a court of equal authority, just the contrary of this, that nothing short of actual proceedings in bankruptcy would prevent a recourse to the writ; and the question may therefore be regarded as an open one. The further position taken in the O'Hara Case, that the writ was obnoxious to the bankruptcy law and so not allowable, because it would enable the execution creditor to obtain a preference, is an objection which would equally apply to a fi. fa. or other process to enforce the collection of a judgment, and is, of course, not tenable. Chandler v. Siddle, 3 Dill. 479, Fed. Cas. No. 2594; Berthelen v. Betts, 4 Hill (N. Y.) 572; In re Hoskins, Crabbe, 466; Ex parte Winternitz, 18 Pittsb. Leg. J. (N. S.) 61. And in Scully v. Kirkpatrick, 79 Pa. 324, and Hubert v. Horter, 81 Pa. 39, the writ was sustained notwithstanding bankruptcy, which negatives any such idea; the fact that the debts there were not discharged being immaterial. This is a federal question, however, and must be decided on principle; state decisions at the best being merely advisory.

The act of the Legislature by which the warrant of arrest is given, in substance, provides that in all civil cases, where a party cannot be arrested or imprisoned, it shall be lawful for the plaintiff, having begun suit or obtained judgment, to apply for a warrant to arrest the defendant, upon proof by affidavit that he is about to remove any of his property out of the jurisdiction of the court with intent to defraud his creditors; or that he has property which he fraudulently conceals, or money or property which he unjustly refuses to apply to the payment of the judgment rendered against him; or that he has assigned,

removed, or disposed, or is about to assign, remove, or dispose, of his property with like fraudulent intent; or that the debt in suit was fraudulently contracted. And, the defendant having been thereupon brought in, if the judge by whom the writ was allowed is satisfied that the charges made in the affidavit are substantiated, and that the defendant has done or is about to do any of the acts complained of, he shall commit him to the jail of the county in which the hearing is had, to be there detained until he shall be discharged by law: provided that he shall not be committed, if he pays the debt or demand with costs, or gives satisfactory security to pay the same with interest, within 60 days, if the demand is in judgment and the time allowed for a stay has expired; or gives bond, with sufficient sureties, that he will not assign or remove his property, where that is the fraudulent design charged; or gives like bond to apply within 30 days to the common pleas of the county for the benefit of the insolvent laws of the state, and to comply with the requirements of such laws, and, failing to obtain a discharge, shall surrender himself to the jail again. After having been committed, he may also be relieved from custody upon judgment being rendered in his favor in the pending suit, or upon assigning his property and obtaining a discharge in due course, or by paying or securing the demand with costs, or upon giving either of the bonds mentioned as aforesaid. In taking the benefit of the insolvent laws, either before or after commitment, the defendant is required, as to the matters set forth in his petition, the notice to be given to creditors, the oath to be administered to him, and all things touching his property, to proceed agreeably to the provisions of the act of June 16, 1836 (P. L. 729), entitled "An act relating to insolvent debtors;" the trustee to whom the assignment is made being given the same powers and duties, creditors the same rights and remedies, a discharge the same effect, and the defendant made liable civilly and criminally the same as if the provisions relating thereto were in the warrant of arrest act fully and at length enacted. Turning to the act of 1836 for a better understanding of these provisions, it appears that in his petition to the court for the benefit of the insolvent laws the debtor is to make a statement under oath of all his property and effects and of the debts he owes, giving the names of his creditors, the amounts due to each of them, the nature of the indebtedness, and the causes of his insolvency. And a time for a hearing thereon having been

fixed, and due notice given to creditors, he is thereupon to exhibit to the court a just and true account of his debts, credits, and estate, producing, if required, his books and papers relating thereto, and answering all questions that may be put to him touching the same; and having taken an oath to deliver up all his possessions, and denying any transfer or conveyance in fraud of creditors, he is to execute an assignment thereof to a trustee for the benefit of creditors, being thereafter relieved and discharged from liability to imprisonment by reason of any judgment or decree for the payment of money or for any debt or damages before that contracted, occasioned, or accrued, but property subsequently acquired is still to be liable, although after obtaining a discharge it may, by order of court, on consent of a majority in number and value of creditors, be made exempt from execution for seven years as to any previously existing debt or cause of action. It is further made the duty of the trustee to collect and convert the property so turned over to him, and, having accounted therefor, to distribute the same to creditors, under the direction of the court, upon due proof made of their respective claims. This in a general way was the system of insolvency prevailing at the time the act of 1842, authorizing a warrant of arrest was passed. More recently by act of June 4, 1901 (P. L. 406), there has been a revision and amplification of the law, modifying in some respects the provisions of the act of 1836 which is in terms repealed; but, being in the main the same, the most important difference being that voluntary assignments for the benefit of creditors, as well as those made after arrest upon civil process are provided for, and that creditors, upon accepting a dividend from the insolvent estate, are required to execute releases. So stood the law at the time the warrant of arrest in the case in hand was issued.

That, under the circumstances and subject to the conditions named in the statute, the right to such a warrant exists in the federal, the same as in the state courts, there can be no serious question. As a remedy by execution to reach the property of the debtor given by the state law, it either is carried into the federal law, as provided by § 916 of the Revised Statutes [U. S. Comp. St. 1901, p. 684]; or, being sanctioned by the state statute and so being agreeable to the usages and principles of law, it is to be regarded as a writ, which, although not specifically provided for by act of Congress, is capable of being adopted as necessary for the full and complete exercise of the jurisdiction

of the federal courts, within the meaning of section 716. It stands in fact much the same as a *capias ad satisfaciendum*, of which it may be considered as only another form. Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Bank v. Halstead, 10 Wheat. 51, 6 L. ed. 264; Ex parte Boyd, 105 U. S. 647, 26 L. ed. 1200; Lamaster v. Keeler, 123 U. S. 376, 8 Sup. Ct. 197, 31 L. ed. 238; U. S. v. Arnold, 69 Fed. 987, 16 C. C. A. 575; Stroheim v. Deimel, 77 Fed. 802, 23 C. C. A. 467. Of course, it goes into the federal law, if at all, with all its essential incidents, and the method of procedure marked out with regard to it by the state statute has therefore to be substantially followed. And the defendant, after having been taken into custody, and being about to be committed, having the right, as a part of it, to be released upon giving bond to take the benefit of the insolvent laws, or at least agreeably to the provisions of these laws, if this right is to be regarded as inhering in the remedy, and has been taken away by the passage of the bankruptcy act, as argued, without anything else being supplied, the right to the writ itself is also therewith necessarily abrogated.

That the right to relief agreeably to the insolvent laws of the state, either before or after commitment, inheres in the remedy, can hardly be doubted. This alternative is expressly given by the statute; it being declared that the defendant, upon the facts on which the writ is predicated having been found against him, shall not be committed, if he shall enter into a bond to the plaintiff to apply within 30 days for the benefit of these laws, and shall comply in all respects with their requirements; or, in default thereof and failing to obtain a discharge, shall surrender himself into custody again. It must be assumed that the Legislature, in allowing the writ, would not have sanctioned it upon any other terms; and the measure of relief which is so afforded being thus in contemplation, as an essential part of the proceedings, they are left incomplete and dismembered without it. In this respect, it differs from the case of a ca. sa. the right to be discharged from custody, which is there given by resort to the insolvent laws, being a separate and independent statutory provision, as to which, if it is taken away or suspended by the passage of a bankruptcy act, the defendant is simply left without the opportunity to be released which would otherwise be afforded him. Steelman v. Mattix, 36 N. J. Law, 344; In re Rank, Crabbe, 493, Fed. Cas. No. 11,566. It is to be noted, however, that these observations do not apply where the fraudulent

design charged, upon which the warrant of arrest is allowed, is that the defendant is about to remove his property out of the jurisdiction of the court with intent to defraud his creditors; the alternative, in order to escape commitment, where that is the fact, being simply that he shall give bond not to remove it nor to prefer other creditors. Neither are they applicable where the defendant gives security to pay the debt or demand with interest and costs, within 60 days if it is in judgment and the time for a stay has expired, or, if not in judgment, within a like period after it shall have been recovered, in either of which cases the superseding of the insolvent laws by a bankruptcy law is of no consequence, and the right to the writ therefore as to them is beyond controversy.

It is also, of course, unquestioned that state insolvency laws, whether a discharge of the debtor from his liabilities is thereby provided for or not, are superseded and suspended by the passage of a federal bankruptcy law; the authority of Congress on the subject being paramount. Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. ed. 855; In re Salmon (D. C.) 143 Fed. 395; In re International Coal Mining Co., 143 Fed. 665; Harbaugh v. Costello, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147; Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258; In re Reynolds, 8 R. I. 485, 5 Am. Rep. 615; Potts v. Smith Mfg. Co., 25 Pa. Super. Ct. 206. Only, however, as the two conflict, is this true, and it is only, therefore, where the bankruptcy law covers and supplies that which is undertaken to be disposed of by the state law, that the latter must give way. It does not apply, for instance, to voluntary assignments for the benefit of creditors, although forming a part of the general insolvency system of the state and regulated to a certain extent by statute; it being held that, as these are good at common law, they are to be carried out and given effect unless they are directly called in question by a petition in bankruptcy. Mayer v. Hellman, 91 U. S. 496, 23 L. ed. 377; Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. ed. 760; Beck v. Parker, 85 Pa. 262, 3 Am. Rep. 625; Reed v. Taylor, 32 Iowa, 209, 7 Am. Rep. 180; In re Sievers (D. C.) 91 Fed. 366. The same is true, also, of proceedings given by statute to wind up the affairs of an insolvent corporation by the appointment of a receiver (In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933; In

re Wilmington Hosiery Co. [D. C.] 120 Fed. 180); and so is it as to debts and claims which are not discharged by bankruptcy (Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62; Hubert v. Horter, 81 Pa. 39; Ex parte Winternitz, 18 Pittsb. Leg. J. [N. S.] 61); as well as to those persons whose debts do not aggregate the requisite amount (Shepardson's App., 36 Conn. 23); or who are not subject to proceedings, such as wage-earners, farmers, and corporations not made specifically liable (Rittenhouse's Estate, 30 Pa. Super. Ct. 468). Neither, as it has been held, does the existing bankruptcy law meet the case of an absconding debtor, so as to prevent the issuing of a domestic attachment. McCullough v. Goodhart, 8 Dist. (Pa.) 378. Poor debtor laws, and those which provide for the release of insolvent convicts, would seem to be in the same situation; the bankruptcy law having no provision adapted to these cases, and the parties to whom they apply being, otherwise, left without remedy. Jordan v. Hall, 9 R. I. 219, 11 Am. Rep. 245. And, notwithstanding the concession made above, not a little could also be said in favor of those insolvent laws, such as the act of 1836, which merely provide means for relieving from custody a debtor who has been arrested upon civil process without undertaking to discharge him from his liabilities. Steelman v. Mattix, 36 N. J. Law, 344; In re Rank, Crabbe, 493, Fed. Cas. No. 11,566; Sullivan v. Hieskell, Crabbe, 525, Fed. Cas. No. 13,594. Subject to these exceptions, however, but without losing sight of their significance, the insolvent laws of a state being rendered inoperative by an existing federal bankruptcy law, those of Pennsylvania must be regarded as no longer in force, with all the attendant consequences, whether the act of 1836 or that of 1901 be taken to represent them.

But it by no means follows that the right to a warrant of arrest such as is now in controversy is thereby disposed of. The state insolvency system which is superseded by the enactment by Congress of a bankruptcy law is one thing, and the relief accorded to a debtor in custody under a warrant of arrest, agreeably to its provisions, is another, and the two are not to be confounded. The debtor, in other words, secures a release, not by virtue of the insolvent laws, but simply in conformity with them; that is to say, by following the course which is there marked out, the one statute, so far as it is applicable, being written into the other. How far in this respect the act of 1901 takes the place of the act of 1836, which has been repealed by

it, it is not important to inquire. Whichever be taken, having been made a constituent part of the act of 1842, the right thereby secured to a debtor in custody under a warrant of arrest, either before or after commitment, is preserved and retained and made available to him without regard to the fate of the insolvent laws as such, whether suspended or repealed, being in effect independent of them. I do not lose sight of the fact that the bond, which the defendant is to give, is in terms to take the benefit of these laws and to comply with their requirements, and that the petition which he is to present to the court for leave to do so is to set forth what is directed by the act of 1836, and to be verified in accordance with it. But a careful reading of the act of 1842 (§§ 14, 15, 16) will disclose that this amounts to no more than an adoption of the course to be pursued and the steps to be taken by the act referred to; the reference over being made for the sake of convenience merely and to avoid unnecessary repetition. Suppose, for example, that the provisions of the act of 1836 had been written into the act of 1842 at length —as by express declaration is in effect the case—and it was there enacted, as now, that upon complaint being made of any of the several matters, upon which the writ is allowable, a warrant should go out, and upon the defendant being brought in and the facts found against him, he should be committed, to be released, however, upon giving bond that within 30 days he would petition the court for leave to assign his property for the benefit of creditors to be administered and distributed under the direction of the court; and so on, according to all that is provided for. Can there be any serious question that the warrant as so authorized could issue, regardless of whether or not the state insolvent laws from which these provisions had been taken had been superseded by an act on the subject of bankruptcy? And yet that in effect is the situation here. Or, to put it in another form, the act of 1842, in adopting and incorporating into itself, as an alternative of the proceedings upon the warrant, the course marked out by the insolvent laws for the relief of a failing debtor, is not thereby made a part of the insolvency system of the state, nor so tied up to it as to be obnoxious to an existing bankruptcy law and be nullified thereby. A petition in bankruptcy, duly prosecuted, is no doubt effective to avoid the proceedings. Barber v. Rogers, 71 Pa. 362. But the statute by which the warrant is given is no more affected by the bankruptcy law itself, and is no more incompatible with

it—aside from the question of getting a preference—than is that which sanctions a capias or any other execution process to reach the person or property of the debtor of which it is only an additional and special form.

This disposes of the case; but there is another ground upon which the right to the writ may be sustained. As pointed out above, a warrant of arrest, being authorized by the statutes of the state, must be regarded as agreeable to the usages of law; and, being necessary to a complete exercise of the court's jurisdiction, is capable of being adopted, although not specifically provided for by any federal statute. Rev. St. § 716 [U. S. Comp. St. 1901, p. 580]. But in incorporating it into the federal law the court is only called upon to preserve the substance; and if, as argued, notwithstanding the views expressed above, the insolvent laws of the state are superseded and the defendant thereby deprived of the right to resort to them which he would otherwise have as a means of being relieved from custody, the bankruptcy law by which this is brought about may well be looked to, to supply what is lacking. It is equally effective and entirely appropriate, the commitment of the defendant being merely until he shall be discharged by law; and is even more readily available, no bond being required nor anything in fact but the filing of a proper petition. Proceedings in bankruptcy also undoubtedly do away with the necessity for taking the benefit of the insolvent laws, although a bond may have been given by the defendant to do so. Nesbit v. Greaves, 6 Watts & S. (Pa.) 120; Barber v. Rogers, 71 Pa. 362. And why, then, may not a complete substitute be found in them? The writ is to be saved, if possible; and, if it can be done by falling back upon the bankruptcy law in this way, there is no reason why the practice should not to that extent be modified, not only in the federal, but in the state courts as well, it being desirable, of course, if not indeed necessary, that the two should be in harmony. It is true that a resort to bankruptcy would not release the defendant where the debt or demand upon which the warrant of arrest was predicated was not dischargeable. Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62; Hubert v. Horter, 81 Pa. 39; In re Winternitz, 18 Pittsb. Leg. J. (N. S.) 61. But in that case the right to the benefit of the insolvent laws would not be interfered with, and there is no occasion therefore to consider it. * * *

The rule to show cause why the warrant of arrest should not

be quashed is discharged; and thereupon the defendant is committed to the common jail of Lycoming county, at Williamsport, Pa., to be there detained until he shall be discharged by law.

OLD TOWN BANK OF BALTIMORE v. McCORMICK et al.

96 Md. 341, 53 Atl. 934

(Court of Appeals of Maryland. January 21, 1903)

FOWLER, J. This is an appeal from the circuit court for Harford county. On the 22d May, 1901, the Old Town Bank of Baltimore filed a petition in insolvency against J. Lawrence McCormick and others under the provisions of article 47, §§ 22, 23, of our Code, relating to insolvents, as amended by the Act of 1896, c. 446. The defendants each pleaded to the jurisdiction of the court. Their pleas are identical. The plea is as follows: "(1) That this court has no jurisdiction in these proceedings, because the insolvency laws of the state of Maryland have been suspended, superseded, or rendered inoperative by the passage of a national bankrupt law by the congress of the United States, and this defendant pleads the said bankrupt law in bar of the jurisdiction of this court in the premises." The plaintiff bank demurred to these pleas, but the learned judge below overruled the demurrers, and his certificate states the question raised and decided on the demurrers as follows: "That the enactment of the act of congress approved July 1, 1898 [U. S. Comp. St. 1901, p. 3418], entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' and supplements and additions thereto, suspended the operation of article 47 of the Code of Public General Laws of Maryland of 1888, entitled 'Insolvents,' and all amendments thereof, and especially suspended the operation of § 22, (as repealed and amended by the act of 1896, c. 446), and § 23 thereof, including the operation of said article on persons 'engaged chiefly in farming and tillage of the soil,' and the class of persons to which the defendant J. Lawrence McCormick is alleged in the petition to belong, and that this court is without jurisdiction to grant any of the relief prayed for in said petition." From the order dismissing its petition, the plaintiff has appealed. The issue thus presented is clear and well defined. The defendants contend that the enactment of the national bankrupt act suspended the operation of the whole insolvent law of this state, while the plaintiff

maintains the position that the passage of this national law by congress suspends the operation of our insolvent law only so far as our law conflicts with the national law, and that, inasmuch as the present bankrupt law (act of congress of 1898 [U. S. Comp. St. 1901, p. 3418]) contains no provision for involuntary bankruptcy of persons engaged chiefly in the tillage of the soil, the provisions of our state insolvent law, so far as they apply to that excepted class, remain in full force and effect. The question presented must depend, in the first place, upon the provisions of the bankrupt law applicable here. § 4, "Who may become bankrupts," subsection (a), provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." And by subsection (b) it is enacted that "any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil * * * may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. * * *"

1. From the year 1819, when Chief Justice Marshall delivered the opinion of the supreme court of the United States in the leading case of Sturges v. Crowninshield, reported in 4 Wheat. 122, 4 L. ed. 529, it has been held that the provision of the constitution of the United States (article 1, § 8, subd. 4) providing that "congress shall have power to establish uniform laws on the subject of bankruptcy," does not in itself inhibit the states from passing valid insolvent laws. In the case just cited it was said: "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." And so, also, there has been a uniform line of decisions to the effect that, so far as congress has failed to legislate with reference to insolvents, state laws relating to them are operative. Thus, in Sturges v. Crowninshield, supra, it is said that "if it is not the mere existence of the power, but its actual exercise by the congress of the United States, which prevents the operation of state insolvent laws, it is obvious that much inconvenience would result from that construction of the constitution which should deny to the legislatures of the states the power of acting on this subject in consequence of the grant to congress." "It may be thought more convenient," continued the court, "that much of it should be regulated by state legislation, and congress may purposely omit to provide for many cases to which its power extends. It does not appear to be a violent construction of the

constitution, and certainly a most convenient one, to consider the power of the states as existing over such cases as the laws of the land may not reach." But in Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606, the rule is explicitly laid down that "the power of congress to establish uniform laws on the subject of bankruptcy does not exclude the rights of the states to legislate on the same subject, except when the power has been actually exercised, and the state laws conflict with those of congress." And to the same effect are Baldwin v. Hale, 1 Wall. 229, 17 L. ed. 531; Tua v. Carriere, 117 U. S. 210, 6 Sup. Ct. 565, 29 L. ed. 855; Ex parte Eames, 2 Story, 322, Fed. Cas. No. 4,237. In the recent case of R. H. Herron Co. v. Superior Court of City and County of San Francisco, decided in April of last year by the supreme court of California, and reported in 68 Pac. 814, 136 Cal. 279, it was held that, "though the federal bankrupt acts suspend operation of any state laws of insolvency where there is any conflict between the two, the state laws remain in full force in so far as there is no conflict; and as the bankruptcy act of 1898 expressly exempts all corporations from voluntary bankruptcy, and only makes subject to involuntary bankruptcy 'corporations engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits,' the provisions of the state law applicable to a corporation engaged principally in mining [as was the California corporation] are not suspended." In the course of its opinion the court said: "If the bankruptcy act excepts a class of cases from its operation, either in express terms or by necessary implication, it must be considered that it was the intention of congress not to interfere in that class of cases with the laws of the several states in reference thereto." A number of cases are cited by Justice Harrison, who delivered the opinion of the court, and among them is that of Clarke v. Ray, 1 Har. & J. 318; Chief Justice Chase delivering the opinion of the court. He said: "The legislatures of the several states have competent authority to pass laws for the relief of all persons who are not comprehended within the act of congress." See, also, Van Nostrand v. Carr, 30 Md. 131. It should be remarked, however, that the situation in the California case just cited somewhat differs from the one here presented. For there the insolvent proceeded against under the California insolvent law was expressly excepted from the provisions relating to the voluntary system, and was not included within, and therefore excepted by implication from the class of corporations made subject to the

involuntary system, while here the defendant who is sought to be declared an insolvent under our insolvent law is included under the general terms of the voluntary system, and expressly excepted from the involuntary system. See, also, Shepardson's Appeal, 36 Conn. 23; Geery's Appeal, 43 Conn. 289, 21 Am. Rep. 653; Steelman v. Mattix, 36 N. J. Law, 344; 16 Am. & Eng. Enc. Law, 642.

2. This brings us to the real question in the case, namely, is there any conflict between our insolvent law and the federal bankrupt law? We have already transcribed the provisions of § 4, by which it appears that the defendant is expressly excepted from the provisions of the act relating to involuntary bankruptcy, and therefore as to this class to which the defendant belongs (i. e., farmers or tillers of the soil) the federal power has not been exercised. And it therefore follows that, if this class is not within the state law, there is no existing provision under which those embraced within it can be compelled to distribute their assets fairly and equally among their creditors. In Geery's Appeal, supra, it was said: "The benefit of this principle [the equal distribution of a debtor's property without preference] cannot be denied to a creditor without doing him injustice. It is a remedy which he relied on in giving credit, and to which he is fairly entitled. If that remedy is not to be found in the bankrupt act, it will not be presumed that congress intended to take away the remedy provided by the state. Congress having limited and restricted the operation of the bankrupt act, leaving a number of cases to which it does not apply, it will not be presumed that it was thereby intended to leave creditors in such cases entirely without remedy, as must be the case if the state law is entirely inoperative." But can it be properly or correctly said that any conflict can exist between the state and the federal law so long as the latter by express terms excludes from its operation the subject or class of persons expressly provided for by the state law? The power to enact insolvent or bankrupt laws is vested in the states, and it cannot be extinguished except by the establishment of a federal system in conflict with the state law. And this federal system of bankruptcy must be a genuine bankrupt law (Sturges v. Crowninshield, supra), or, in other words, as expressed in Ogden v. Saunders, supra, the power to pass a uniform system of bankruptcy must be actually exercised, and the state law must be in conflict with it in order to render the latter inoperative. The ques-

tion, therefore, logically arises, does the present federal bankrupt law actually provide for involuntary proceedings against farmers? And the answer must be that it does not, but the answer of the defendant goes further and necessarily must do so in order to save his case. He says it is true that while this class is not included in, and is expressly excepted from, the involuntary feature of the system, yet it is included in the voluntary feature, and therefore it is within the scope of the national system. We cannot approve of this method of reasoning, not only because it would seem to be a "contradiction in terms to say that cases excepted from the operation of the most important part of the act are included in its scope," but because it would seem to involve the proposition that the federal power can render inoperative the state insolvent laws applicable to involuntary insolvency, without establishing a genuine bankrupt law to take the place of the state law. As we have already seen, it has been held from early day that it is only to the extent that congress has actually legislated upon the subject that the statutes of the several states are suspended by its legislation. How, then, can it be said that a failure to legislate—in other words, an express exclusion—raises a conflict? But without pursuing this question further, it seems to us that the position taken by the defendant must necessarily lead to the conclusion that if the congress of the United States can, by including this class in the voluntary part of the system, and excepting it from the involuntary part, withdraw it from the operation of our state insolvent law, it can do the same in regard to any two or more classes (as, for instance, merchants, traders, and corporations); and the result would be that, in spite of the failure on the part of congress to establish a bankrupt law (that is, to actually exercise the power conferred by the constitution to pass a genuine bankrupt law), state legislation would become inoperative, and creditors would be deprived of a remedy to which, as was said in Geery's Appeal, supra, they are fairly entitled.

But it was forcibly argued on the part of the defendants that § 70, subsec. "b," of the bankrupt act of 1898 [U. S. Comp. St. 1901, p. 3452], shows that it was the intention of congress to substitute that act for every provision of every insolvent law of the several states. It provides as follows: "Proceedings commenced under state insolvent laws before the passage of this act shall not be affected by it." To sustain their view, the case of Manufacturing Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529,

70 Am. St. Rep. 278, decided in 1898, was relied on. But all this case decides is that the federal act deprives the state court of jurisdiction to entertain jurisdiction in insolvency proceedings filed after 1st July, 1898, when the federal act went into force. Or as the court said: "The act is to go into full force and effect upon its passage. That is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage." After mentioning a number of the rights which are determined by the act, the opinion continues: "These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state, and they supersede all conflicting provisions." In the concluding part of the opinion the distinguished judge who has recently been appointed chief justice of the supreme judicial court of Massachusetts said that the language of § 70, subsec. "b," "was chosen to make clear the purpose of congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the act"; but necessarily this language means only that all conflicting provisions of the state law were thus superseded, for this is the well-settled proposition which he had just announced in a preceding sentence, and which we have quoted above. If, therefore, we are correct in the conclusion already reached, that there is no conflict between the provisions of our insolvent law and the present bankrupt law, it follows that the language of § 70 relied on by the defendant can have no influence upon our conclusion in this case.

But again, it was urged that there is a distinction between this case and cases which arose under laws which did not include the class within its scope—as, for instance, where the bankrupt act applied only to debtors whose debts exceeded $300. It was held in Shepardson's Appeal, supra, that in cases where the debts were less than $300 the state law was not suspended, and debtors of that class could be proceeded against under state laws. But the true rule was laid down by Chief Justice Marshall in Sturges v. Crowninshield, supra, that the power of the state continues to exist over such cases as the federal law does not reach. And therefore, if cases involving involuntary proceedings against a class are not provided for by the federal law, such cases are within the reach of the state law, in spite of the fact that the

members of this same class may avail themselves of the voluntary feature; otherwise the rule laid down by Chief Justice Marshall would have to be changed so as to read that the power of the state exists only over such cases as are against natural persons or corporations not within any class provided for by any provision of the federal law. If this were the rule, then, of course, it would follow, as contended, that the defendant being of the class called "farmers," and the bankrupt act having provided that he may avail himself of the voluntary feature, no case against him could be reached by the state law. But in our opinion, this is not the proper view, for, as we have already said, it is not within the power of congress to render inoperative the involuntary feature of state insolvent laws as to any particular class by excepting that class from the involuntary part of the national law. Otherwise the result would be that the state laws as to involuntary insolvency would become inoperative by the mere existence of the power of the United States to establish a system of involuntary bankruptcy. We have seen, however, that it is not the mere existence, but the exercise of the power to establish a genuine bankrupt law in conflict with the state laws, which renders the latter inoperative. Sturges v. Crowninshield, supra.

In conclusion, it may be proper to say that if it is the policy of our state to render farmers and tillers of the soil like other persons subject to the involuntary system of our insolvent laws, as it is declared to be by the provisions of our Code (article 47, §§ 22, 23), we should not by any strained construction of an act of congress, or by a course of ingenious reasoning, attempt to thwart this purpose.

From what we have said, it will be seen that we are of opinion that the order appealed from should be reversed. Order reversed and new trial awarded.[2]

2—*Acc.* Burk's Estate, 34 Pa. Co. Ct. Rep. 642; Lace v. Smith, 34 R. I. 1, 82 Atl. 268. See, also, note in 11 MICH. LAW REV. 60.

See, as to the effect of the Federal Act upon state statutes, in the cases of:

Persons Owing Less Than $1,000. —Littlefield v. Gray, 96 Me. 422, 52 Atl. 925.

Corporations (before 1903 amendment of § 4b).—Herron & Co. v. Superior Court, 136 Cal. 279, 68 Pac. 814, 89 A. S. R. 124; Keystone Co. v. Superior Court, 138 Cal. 738, 72 Pac. 398; In re Hall Co., 121 Fed. 992: (after 1910 amendment of § 4b); In re Weedman Stave Co., 199 Fed. 948.

Building and Loan Associations. —Kurtz v. Bubeck, 39 Pa. Super. Ct. Rep. 370; Continental B. & L.

SECTION II

OF PERSONS

A. Territorial Jurisdiction

1. Natural Persons

In re PLOTKE

104 Fed. 964, 44 C. C. A. 282

(Circuit Court of Appeals, Seventh Circuit. November 22, 1900)

SEAMAN, District Judge. The alleged bankrupt, Emily Plotke, appeals from an order of the district court whereby she is adjudicated a bankrupt upon a creditors' petition filed May 3, 1899. The petition states that "Emily Plotke has for the greater portion of six months next preceding the date of filing this petition had her principal place of business and her domicile at Chicago," in said district, and "owes debts to the amount of $1,000 and over"; that she is insolvent, and within four months next preceding "committed an act of bankruptcy," and on January 3, 1899, made "a general assignment for the benefit of her creditors to one John Poppowitz," which was duly filed and recorded. The subpœna issued thereupon was returned by the marshal as served within the district on Emily Plotke, "by leaving a true copy thereof at her usual place of abode, with Charles Plotke, an adult person, who is a member of the family." On May 29, 1899, the appellant filed a verified plea, which reads as follows:

"And the said Emily Plotke, specially limiting her appearance for the purposes of this plea, in her own proper person comes and defends against the foregoing proceeding, and says that she has not had her domicile within the territorial limits and jurisdiction of this court for the six months next preceding the filing of the petition herein, to wit, six months next preceding May 3, A. D. 1899, nor has she had her domicile within the territorial limits of the jurisdiction of this court as aforesaid during any part of said period of six months, nor has

Assn. v. Superior Court, 163 Calif. 579, 126 Pac. 476; In re New York B. & L. Bank, 127 Fed. 471.

Educational Corporations.—Dille v. People, 118 Ill. App. 426.

she now her domicile therein, nor has she had her principal place of business within the territorial limits and jurisdiction of this court for the greater part of the six months next preceding the filing of the petition herein, to wit, six months next preceding May 3, A. D. 1899, but that before and at the time of the filing of the petition herein as aforesaid, on, to wit, May 3, A. D. 1899, and for more than five years prior thereto, she, the said Emily Plotke, was, and from thence hitherto has been, and still is, residing in the city of St. Louis, and the state of Missouri, and not in the said Northern district of Illinois, and state of Illinois, and that she, the said Emily Plotke, was not found or served with process in this said proceeding in said Northern district of Illinois, or in said state of Illinois. Wherefore she says this court is wholly without jurisdiction in the premises, and this she is ready to verify. Wherefore she prays judgment, if this court here shall take jurisdiction and cognizance of the proceedings aforesaid."

The petitioning creditors filed a replication, and the issues thereupon were referred for hearing to a referee, who reported the testimony taken, with findings sustaining the plea and recommending that the petition be dismissed for want of jurisdiction. The finding was overruled by the district court, and an adjudication of bankruptcy entered, from which this appeal is brought.

The record presents two questions, only, under the several assignments of error: (1) Whether, upon the undisputed facts shown, the case is within the bankruptcy jurisdiction of the district court; and (2) whether jurisdiction appears over the person of the alleged bankrupt.

The first issue challenges the jurisdiction of the district court over the estate of the bankrupt, the subject-matter of the proceeding, irrespective of the question of jurisdiction in personam. The facts are undisputed that the bankrupt has neither resided nor had her domicile within the district for any period during the 6 months preceding the filing of the petition, and has resided continuously in the state of Missouri for the past 12 years; that she carried on business in Chicago, within the district (conducted by one Charles Plotke), from April 30, 1897, up to January 3, 1899 (the petition being filed May 3, 1899); and that she executed a voluntary assignment for the benefit of creditors, under the statute of Illinois, on January 3, 1899 (the assignee taking possession forthwith, and subsequently disposing of the assets and closing out the business under orders of the county

court). The question is thus narrowed to an interpretation of the provisions of the statute. § 2, subd. 1, of the bankruptcy act (30 Stat. 545) invests district courts with jurisdiction to "adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdiction, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction." As both residence and domicile of the bankrupt were beyond the territorial jurisdiction, the adjudication of bankruptcy rests alone upon the provision respecting the "principal place of business." The appellees contend, in effect, (1) that the proof of a principal place of business in the district for two months, and of no place of business for the remaining period of limitation, establishes a case within the meaning of the words "greater portion thereof," in the section above quoted; and, if not so construed, (2) that the voluntary assignment was void under the law of the forum, and business was carried on thereunder for the requisite period, and was constructively the business of the bankrupt. We are of opinion that neither of these contentions is tenable. The first calls for a departure from the plain meaning of the language used in the statute to make it applicable to conditions which may have been overlooked in framing the provision, but are not within the terms which were adopted; and however desirable it may seem to have such conditions brought within its scope, to carry out the general intent of the act, the correction can be made by legislative amendment only, and not by way of judicial construction. So far as applicable here, the provision confers jurisdiction over bankrupts "who have had their principal place of business" within the territorial jurisdiction "for the preceding six months, or the greater portion thereof." Whether thus considered apart from the provision as to residence and domicile, or as an entirety, the language is unambiguous, if not aptly chosen. The expression "greater portion" of a month or other stated period is frequently used as an approximate measure of time, and its meaning is well understood as the major part or more than half of the period named. No justification appears for construing like terms in this provision otherwise than in

the ordinary sense. With jurisdiction dependent upon the single fact of having the principal place of business within the district, the statute then imposes the further prerequisite that such business shall have been there carried on for more than half of the preceding six months. In other words, the limitation is made with reference alone to the duration of the business in the district, and regardless of the fact that its location may be changed short of that period, and thus be carried on in different districts without exceeding the three months in either, or that it may be discontinued entirely without reaching the time limited in any one; and the provisions in reference to domicile and residence are equally restricted, except for the distinction as to residence, that it may be retained in one district after domicile is changed to another. With this meaning clearly conveyed by the language of the statute, the policy of so restricting jurisdiction is not open to judicial inquiry. In support of the construction for which the appellees contend, two decisions are cited whereby § 11 of the bankrupt act of 1867 (§ 5014, Rev. St.) is so construed,—one by Judge Blatchford (In re Foster, 3 Ben. 386, Fed. Cas. No. 4,962), and the other by Judge Lowell (In re Goodfellow, 1 Low. 510, Fed. Cas. No. 5,536). However instructive these cases may be in interpreting the present statute, they are not applicable by way of precedent, because of the clear diversity in the respective provisions. § 11 of the former act gave jurisdiction over petitions filed by voluntary bankrupts to "the judge of the judicial district in which such debtor has resided or carried on business for the six months preceding the time of filing such petition, or for the longest period during such six months"; and the limitation thus stated was held to mean "the longest space of time that the bankrupt has resided or carried on business in any district during the six months." In re Foster, *supra*. It may well be conceded that the language of that provision was susceptible of no other fair interpretation; that "the longest period" of business "during such six months" was clearly implied, and, as remarked by Judge Blatchford, "not the period which, mathematically considered, is the greatest part of the six months." But § 2, subd. 1, of the act of 1898 states the jurisdictional requirements in terms clearly distinguishable from those which were thus construed, namely, that a principal place of business shall have existed within the district "for the preceding six months or the greater portion thereof," thereby establishing as the test

continuance of the business in the district for the "greater portion" of the six months, and not "the longest period" of business "in any district during the six months." This departure from the provisions of the prior act is marked both in the change of words and in their collocation, and is not a mere substitution of synonymous words, as argued by counsel.

The further contention that the requisite period of carrying on business appears in the conceded facts of the voluntary assignment made January 3, 1899, and the transactions thereunder, is not well founded. The question discussed on the argument, whether the bankrupt act made the assignment void *ab initio*, or voidable only in the event of an adjudication of bankruptcy, as affecting the subsequent possession, however important in one phase, is not material in the absence of a distinct showing that the business was continued under the assignment for more than one month. Where jurisdiction of the federal courts is made dependent upon citizenship or other specific fact, "the presumption in every stage of the cause is that it is without their jurisdiction, unless the contrary appears from the record." Bors v. Preston, 111 U. S. 252, 255, 4 Sup. Ct. 407, 28 L. ed. 419; Railway Co. v. Swan, 111 U. S. 379, 383, 4 Sup. Ct. 510, 28 L. ed. 462. The essential fact must appear affirmatively and distinctly, and "it is not sufficient that jurisdiction may be inferred argumentatively." Wolfe v. Insurance Co., 148 U. S. 389, 13 Sup. Ct. 602, 37 L. ed. 493; Parker v. Ormsby, 141 U. S. 81, 83, 11 Sup. Ct. 912, 35 L. ed. 654. In the case at bar the record fails to show that the business was carried on by the assignee for any definite period, and the proof is insufficient to confer jurisdiction, within the rule stated, even on the assumption that the transactions of the assignee were, in legal effect, the carrying on of business by the assignor. It is true that a sale of the assigned property (a stock of goods) appears to have been made by the assignee as an entirety, thus closing out the business; but the time is not stated, and it may well be inferred from the testimony that such sale occurred soon after the assignment was made. The mere fact that proceeds of such sale are retained in the hands of the assignee for distribution is not carrying on business, in the sense of the statute. The active business then ceased, and the liability to account for the proceeds is no more operative to save the limitation than would be the case if the business were closed out directly by the bankrupt, either with or without subsequent

payment of debts out of the proceeds. No evidence being produced to overcome the presumption of fact against jurisdiction, the question of the legal status of the assignment does not require consideration. It may be remarked, however, that the validity of the assignment is not questioned under the state statute, and its status depends upon a construction of the provisions of the national bankruptcy act in that regard, and the inquiry is not one which is governed by any rule of decision in the state. In so far, therefore, as Harbaugh v. Costello, 184 Ill. 110, 56 N. E. 363, passes upon the effect of such act on voluntary assignments made after its passage, the decision is not necessarily controlling, as contended by counsel; but that question, when presented, will call for independent judgment, in the light of all the authorities. In Mayer v. Hellman, 91 U. S. 496, 500, 23 L. ed. 377, a different construction appears to have been placed upon the bankrupt act of 1867; and in Simonson v. Sinscheimer, 95 Fed. 948, 952, 37 C. C. A. 337, 342, that ruling is cited as equally applicable under the present act. See, also, Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372; In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377; In re Gutwillig (D. C.) 90 Fed. 475, 478, cited with approval in West Co. v. Lea, 174 U. S. 590, 596, 19 Sup. Ct. 836, 43 L. ed. 1098.

We are of opinion, therefore, that the district court was without jurisdiction of the cause alleged in the petition, and the question whether the want of personal service was waived by appearance does not call for solution. The order of the district court is reversed, accordingly, with direction to dismiss the petition for want of jurisdiction.

In re GARNEAU

127 Fed. 677, 62 C. C. A. 403

(Circuit Court of Appeals, Seventh Circuit. January 5, 1904)

The bankrupt, a young man 26 years of age, was born in the city of St. Louis, and, with the exception of occasional absences, lived there all his life. Up to March, 1900, he resided with his brother in the city of St. Louis, and was employed by him in a stockyard in that city upon a salary of $50 a month. In March or April, 1900, he removed his residence, as he claims, to the city of East St. Louis, directly across the river from St. Louis, retaining his employment in the business of his brother in the

city of St. Louis. As his sister states: "East St. Louis is not a place any one is apt to go to unless for business. You don't go there for pleasure. It is all stockyards." He rented by the month a room in the house of one Broughan at $10 a month. His effects which he moved into the house were contained in one trunk. In August of that year he removed his trunk, keeping in the room his toilet articles and his nightshirt. The trunk was not returned to the room for over a year, and not until after the proceeding by creditors hereinafter stated. He thus removed, as he claims, to East St. Louis, for the purpose of gaining a residence to file an application in bankruptcy in the Southern District of Illinois, and to secure his discharge, and with the intention of going west immediately thereafter. He did not eat at his lodging, and the record does not show where he was accustomed to take his meals, further than for a while he obtained his breakfast at some restaurant in East St. Louis. He occupied the room at night at first quite regularly, afterwards not for several weeks at a time, and then for four or five nights in a week; but he paid rent for the room up to the present time. On July 13, 1900, he filed his petition in bankruptcy in the District Court for the Southern District of Illinois, praying to be discharged of his debts, and on that day was adjudged a bankrupt, and the matter referred to a referee. At the first meeting of creditors on the 14th of August, 1900, three debts were proven, amounting to $14,700, and the referee reports that there were no assets according to the schedules in the bankrupt's petition, and that the three creditors proving their debts were all the creditors scheduled. On November 21st, upon the petition of the creditors, a citation was issued requiring the bankrupt to appear for examination on December 4th, which was had on that date; the facts concerning his alleged change of residence then appearing and being first known to the creditors. On that date, also, the bankrupt filed his petition for a discharge, and on December 22d, the creditors, who were respectively residents of the states of Nevada and of Utah, filed their petitions moving the court to dismiss the proceeding for want of jurisdiction upon the grounds that the bankrupt did not have his domicile within the district for the greater portion of six months before the filing of the petition, and did not have a *bona fide* residence or domicile within the district at any time; and subsequently, on February 15th, the three creditors filed their separate specific objections to the discharge

of the bankrupt. The two matters—the motion to dismiss the proceeding and the objections to the discharge—were referred to a referee, who returned the testimony taken, and recommended that the petition in bankruptcy be dismissed for want of jurisdiction. Exceptions were filed to the report, and the court below on June 29, 1903, overruled the exceptions, sustained the report, and dismissed the proceeding. The correctness of that ruling is brought up for consideration by a direct appeal and also by an original petition to review.

JENKINS, Circuit Judge (after stating the facts as above). By the terms of the bankruptcy act (Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3421]), the courts of bankruptcy are invested with jurisdiction to adjudge persons bankrupt "who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof." There is, of course, a legal distinction between "domicile" and "residence," although the terms are generally used as synonymous, the distinction depending upon the connection in which and the purpose for which the terms are used. "Domicile" is the place where one has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning, and where he exercises his political rights. There must exist in combination the fact of residence and the *animus manendi*. "Residence" indicates permanency of occupation as distinguished from temporary occupation, but does not include so much as "domicile," which requires an intention continued with residence. 2 Kent, 576. Residence has been defined to be a place where a person's habitation is fixed without any present intention of removing therefrom. It is lost by leaving the place where one has acquired a permanent home and removing to another place *animo non revertendi*, and is gained by remaining in such new place *animo manendi*. Tracy v. Tracy, 62 N. J. Eq. 807, 48 Atl. 533. In Shaeffer v. Gilbert, 73 Md. 66, 20 Atl. 434, the word is thus defined:

"It does not mean * * * one's permanent place of abode where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one's residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been accomplished, but means, as

we understand it, one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time."

The term is an elastic one, and difficult of precise definition. The sense in which it should be used is controlled by reference to the object. Its meaning is dependent upon the circumstances then surrounding the person, upon the character of the work to be performed, upon whether he has a family or a home in another place, and largely upon his present intention. Rindge v. Green, 52 Vt. 208.

There is some looseness and some conflict in the opinions in the definition given to the term "residence." We need not stop to discuss these, because all agree that a residence, whether it must be accompanied *animo manendi* or may exist with a present intention at some time to remove therefrom, must be *bona fide,* not pretentious. Morris v. Gilmer, 129 U. S. 329, 9 Sup. Ct. 293, 32 L. ed. 690. We are constrained to believe that the purported change of residence of the bankrupt from St. Louis to East St. Louis was pretentious only, not real; and was merely for the purpose of pretending to acquire a residence solely for the purpose of filing his petition in bankruptcy in a district in which he did not reside. Indeed, the bankrupt frankly avowed that to be his only purpose, and that he went to East St. Louis with the then intention of leaving the place so soon as he had accomplished his purpose. There was no *bona fide* change of residence. There was no *bona fide* assumption of residence in East St. Louis. He necessarily must spend the hours of business in St. Louis. He left his home in St. Louis, where he resided with relatives, and where he had passed his life, crossed the river, and at much inconvenience to his business assumed a home in a city of stockyards, to which, as his sister remarked, one is not apt "to go to unless for business; don't go there for pleasure," carrying such of his effects as he thought necessary in a single trunk, which he soon removed from the lodging he had engaged, and which was not returned for over a year, retaining at his lodging only articles of toilet and a nightshirt. He was a sojourner merely, and not a resident, of East St. Louis. We look upon this transaction as an imposition upon the jurisdiction of the court. The Congress did not intend that one may select any court of bankruptcy which he pleases in these broad United States, and be enabled, through a pretentious removal to the district of that court, to

obtain his discharge from his debts. To allow that to be done would open the door to grave frauds upon creditors, which we are not disposed to countenance. * * *

The petition for review is denied, and upon the appeal the decree of the court below dismissing the proceeding is affirmed.[3]

2. OF PARTNERSHIPS

In re BLAIR et al.

99 Fed. 76

(District Court, S. D. New York. January 25, 1900)

In Bankruptcy. On motion to dismiss petition in involuntary bankruptcy against the firm of Blair, Stem, Passano & Rosston.

BROWN, District Judge. The petition in the above case was filed on November 20, 1899, against the four defendants above named. It states that they composed the co-partnership doing business under the name and style of the Anglaise-Americaine Soap Company; that during the greater part of the six months next preceding the defendants had their respective domiciles in the county of New York within this district and also had property therein; that the co-partnership being insolvent on October 5, 1899, suffered a judgment to be recovered against it, under which a portion of its property was sold by the sheriff under execution, whereby the judgment creditors would obtain a preference; and the petition asks that said "co-partnership may be adjudged to be a bankrupt."

The subpœna was served personally on Stem in this district; the other defendants were served by order in Baltimore and Richmond. On January 9th the defendant Passano appeared specially for the purpose of moving to dismiss the petition for want of jurisdiction, and upon an affidavit obtained an order to show cause why the petition should not be dismissed. The affidavit states in brief that none of the defendants had their residence or domicile at any time within this district; that Blair during all the period referred to had his domicile and resided at Richmond, Va., and the other three defendants at Baltimore, Md.; that Passano had left the firm from three to four months before the petition was filed, and Rosston a month

3—*Cf.* In re Williams, 120 Fed. 34; In re Oldstein, 182 Fed. 409.

later; and that at the time of the preference alleged, the firm consisted of Blair and Stem only.

Upon the return of the order to show cause and on hearing, a reference to a commissioner was ordered to take proof and report the facts as to the place of business as well as the residence or domicile of all the parties.

From the report of the commissioner, it appears that the business of the Anglaise-Americaine Soap Company was started at Baltimore, where it was continued until about August 11th or 12th, when it was removed to this district; that on July 22, 1899, Passano withdrew from the firm, transferring his interest to the other three partners, who by agreement assumed all the co-partnership liabilities; that on August 11, 1899, Rosston also retired from the firm, whereupon the business was removed to this district by Blair and Stem, the remaining partners, as above stated; that Blair and Stem, from that time, continued the business under the same name and under the name and style of "Blair-Stem Company, Selling Agents for Anglaise-Americaine Soap Company"; that they continued the business in this district until on or about November 1, 1899, after which date and until the petition was filed November 9th, they were engaged in winding up the affairs of said company; and that they had no other place of business subsequent to August 12, 1899; that Blair, between the 12th and 18th of August, removed to New York from Baltimore, where he continued to reside until the 1st day of November, when he went to Richmond to reside; that Stem did not reside or have his domicile here, at any time prior to November 7, 1899.

These findings are supported by the evidence. They show, therefore, that the petition cannot be sustained upon its averment of domicile within this district, since neither of the four partners had his domicile or resided here long enough to support the jurisdiction of the court.

Further inquiry concerning the place of business of the several partners was had in view of the possible allowance of an amendment to the petition, setting up a place of business within the district for the requisite period. § 5c of the act provides that in cases of partnership "the court which has jurisdiction of one of the partners may have jurisdiction of all"; and by § 2, subd. 1, the court is authorized to adjudge bankrupt persons "who have had their principal place of business, resided, or had their domicile within its jurisdiction" for the greater por-

tion of the six months preceding the petition. The above facts show that two of the partners, Blair and Stem, had their only place of business within this district for a little over three months prior to the petition, if the period from November 1st to November 20th be deemed a period of doing business, during which the firm of Blair and Stem was in liquidation, in charge of Mr. Stem; otherwise not. Under the circumstances above stated, I think the period from November 1st to November 20th cannot be excluded from the period during which Stem at least had his principal place of business in New York. The circumstances are altogether different from those in the case of In re Little, 2 N. B. R. 294, Fed. Cas. No. 8,391.

It is urged that the business conducted by Blair and Stem in New York, was not the original partnership business of the four partners above named, but the business of a new firm; and that the provision of § 5c should be held applicable only to cases where the partner is transacting the same firm's business within the particular jurisdiction, and not where he is simply transacting an independent business of his own. But in this case Stem and Blair were in fact liquidating the old firm's business during this time. Nor do I perceive any sound reason for limiting, as suggested, the ordinary meaning of the language used in §§ 5c and 2, subd. 1. Whatever doubts may have been raised under the act of 1867 (Cameron v. Canieo, 9 N. B. R. 527, 4 Fed. Cas. 1,128), the proceeding may certainly now be commenced in any district in which either partner resides; the present act leaves no doubt on this point (Lowell, Bankr. 360; Loveland, Bankr. 191; In re Murray [D. C.] 96 Fed. 600); and the same was held by Story, J., under the act of 1841. The reasons for the broad option given by the present act were probably reasons of convenience, and to authorize the proceedings to be had in any district wherein a partner was ordinarily to be found, whether by residence, domicile, or place of business.

If the petition were amended, therefore, by averring that Stem's place of business was here during the requisite period, the jurisdiction of the court should be sustained. The petition must, however, further show whether any of the individual partners are solvent. As it stands, it is ambiguous in this regard. It avers that the "partnership is insolvent"; but other statements seem to intimate that by that averment it is intended only to state that the joint assets are not sufficient to pay the

joint obligations. No doubt a firm is sometimes said to be insolvent when only a deficiency of joint assets is meant. But as each partner is liable in solido for the debts of the company, so that they are debts of each individual member as much and as truly as they are debts of the firm, a partnership cannot with strictness be said to be insolvent while any one of the partners is able to pay all the firm's liabilities. Lowell, Bankr. 359; Hanson v. Paige, 3 Gray, 239, 242; In re Bennett, 2 Low. 400, 3 Fed. Cas. 209. By the express provision of § 5h, moreover, the firm assets cannot be administered in bankruptcy if one of the partners is not adjudged bankrupt, unless by his consent. Bank v. Meyer (D. C.) 92 Fed. 896; In re Meyer (C. C. A.) 98 Fed. 976. It is therefore required by rule 1 of this court that the petition shall state whether any partner, not joining in the petition, is solvent or insolvent. Form 2, moreover, prescribed by the supreme court (18 Sup. Ct. xviii.), requires for an adjudication of "the firm" as bankrupts, a statement in the petition that "the partners owe debts which they are unable to pay in full." This necessarily includes the individual responsibility of each, as well as their joint responsibility; and that form evidently contemplates that an adjudication of the firm imports an adjudication of all its members as well. To avoid any ambiguity, and any delay or complication in the subsequent proceedings, the insolvency of each member of the firm should be alleged in the petition if an adjudication against the firm and an administration of the firm assets in bankruptcy are sought, in order that issue on that point, if disputed, may be at once taken and heard along with any other issues, and the scope of the proceeding determined without further delay.

The petition may be amended, if desired, within 10 days; if not so amended it will be dismissed.

3. OF CORPORATIONS

In re MATHEWS CONSOLIDATED SLATE CO.

144 Fed. 724

(United States District Court, District of Massachusetts. November 24, 1905)

An involuntary petition was filed in the District Court for the District of Massachusetts against the Mathews Consolidated

Slate Co. (a corporation organized under the laws of New Jersey); the company did not object to an adjudication, but objections were filed by a creditor who had obtained a judgment in New York against the company. One objection was based on his contention that the District Court for the District of Massachusetts was without jurisdiction because the alleged bankrupt did not have its principal place of business, reside, or have its domicile within that district. The issues were referred to a referee, who found that the court had jurisdiction, and recommended an adjudication.

DODGE, District Judge. * * * There is no dispute that the bankrupt was a corporation organized under the laws of New Jersey, as found in the report. Its domicile therefore was not in Massachusetts. In this jurisdiction it was a foreign corporation. Within the meaning of the acts giving jurisdiction to federal courts of suits between citizens of different states, such a corporation could have no residence in Massachusetts. Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768. In my opinion such a corporation cannot be said to have "resided" here within the meaning of § 2 (1) of the bankruptcy act. It cannot therefore be adjudged a bankrupt here, unless it had its principal place of business in Massachusetts for the six months preceding June 22, 1905, or for the greater part of that period.

First. The referee has found it to be a fact that the bankrupt's principal place of business and its headquarters were at Boston, within the District of Massachusetts, and the respondent contends that the finding was not warranted by the evidence.

Whatever may be the correct description, for the purposes of the question which is raised under § 4b of the bankruptcy act, and which is considered below, of the business in which the bankrupt was principally engaged, there is no dispute that its business consisted in the operation of slate quarries and slate mills and in selling the slate thus obtained or produced. Upon the evidence which accompanies the report, I find the facts below stated as follows:

(1) The quarries operated were situated either in Vermont or New York, all near the line between those states, and all within about 12 miles of Poultney, Vt. The principal slate mill was at Middle Granville, N. Y. This produced structural slate.

At several of the quarries were also mills producing roofing slate, as is hereinafter more fully explained.

(2) The company was organized in May, 1902. Its officers were, and had been since its organization, a president, vice president, treasurer, secretary, and general manager. From 1902 until the filing of the petition it maintained offices in the Sears Building in Boston. These were at least its executive offices and selling agency. In them the officers above mentioned, who all, during the six months before the filing of the petition, resided in Boston, were regularly to be found and all their official business was there regularly carried on, except that the general manager spent part of his time and performed part of his duties in Poultney, as below stated. In the same offices the directors, a majority of whom resided in Boston during the same period, held all their meetings during that period. The stockbook was kept there. The minutes of the directors and the corporation books of account were kept there. Its correspondence was conducted from there. The great bulk of sales of the product of the quarries and mills was negotiated there or from there; about 1 per cent. only of the total sales being made from Poultney. All bills for produce sold were sent out from there, being there made up from shipping slips forwarded there from Poultney. The prices of goods sold were fixed there, and the payments for goods sold received there. One regular salesman was employed, who was to be found there, except when on the road, and who was never to be found at the quarries or at Poultney. When on the road his reports were all made to the Boston office, and all orders from him were received there, but only a small proportion of the sales was made by him. From one to three clerks or stenographers were employed there in the transaction of the company's business.

(3) The principal banking of the company was done in Boston. All money received for goods sold was deposited either in the City Trust Company or the Webster & Atlas Bank, both of Boston. These were the principal bank deposits kept by the company. All notes, accounts, and bills payable were rendered to the Boston office, after being approved when necessary at other places, as below, and were paid, as a rule, by checks drawn on the above bank deposits. Such checks were drawn at the Boston office, and were there signed by the treasurer and countersigned by the president. This did not apply to the pay

roll checks, further spoken of below, which were signed by the treasurer only.

(4) The company also maintained offices during the six months prior to the filing of the petition at Poultney. From there the operations carried on at its quarries and mills were directed, as below stated, subject to the supervision of the Boston office. At each quarry the company had a superintendent. Under each quarry superintendent there was a boss over each gang of men employed, whether in the quarries or mills. Weekly reports were sent from the quarries and mills to the Poultney office, from which reports of product and shipments were there made up and sent to the Boston office. All shipments were made from the Poultney office, as required to fill orders, which were ordinarily sent from the Boston office. Stock sheets showing product on hand were kept at the Poultney office. These were compared usually every month with stock sheets kept at the Boston office. For about eight months preceding the filing of the petition, in addition to the general manager above referred to, a quarry manager had been employed, who lived at Poultney and had all the active and immediate direction of all the quarries and mills, always, however, subject to the supervision and instructions of the general manager above referred to, who ordered the increase or decrease of laborers employed at the various quarries, or the making of new openings, as occasion required. The general manager made frequent visits to Poultney, at least as often as once in each month. Prior to the employment of the quarry manager, the then general manager had resided at Poultney, and there performed the duties of the quarry manager, receiving his directions regarding them from the president, at Boston. Such supplies in general as were required in operating the quarries or mills were as a rule purchased by the quarry manager acting from the Poultney office. These purchases were made in New York and Vermont and to a small extent in Boston. Bills for goods so purchased were approved by the quarry manager and sent to Boston for payment.

(5) In banks at Poultney and Granville, N. Y., funds were deposited by the company just sufficient to cover its pay roll each month. The pay rolls were made up and approved by the quarry manager at Poultney, and were then forwarded to the Boston office, where the treasurer signed the necessary checks and forwarded the required money to the Poultney and Gran-

ville banks above mentioned, to be used to cash the pay roll checks. The general method was as above until about a year before the filing of the petition, when it was changed so far as the Poultney banks were concerned. Objection having been made by them to paying the checks referred to because the account maintained was so small, currency to the required amount had been, during the year referred to, forwarded from the Boston to the Poultney office and the Poultney pay roll checks cashed at that office. The deposits in the Poultney and Granville banks were chiefly, if not entirely, used for meeting the pay roll checks as stated, and the average amount allowed to remain on deposit there was at all times small in comparison with that allowed to remain in the Boston institutions.

(6) The mill and most of the quarries referred to were owned by the Mathews Slate Company, a corporation organized under the laws of Maine. Only two of the quarries operated did not belong to that company, both of them situated in New York. One of them was owned and one leased by the bankrupt. The properties of the Mathews Slate Company were subject to a mortgage given by that company to the American Loan & Trust Company of Boston, as trustee, to secure an issue of bonds amounting to $500,000. The bankrupt owned all the stock of the Mathews Slate Company, except five shares held by its directors in order to qualify them, and also owned $366,000 of the bonds issued by it, as above. All the properties of the bankrupt, including said stock and bonds, were subject to a mortgage given by it to the City Trust Company of Boston, as trustee, to secure an issue of its own bonds, amounting to $600,000. The coupons on these bonds, due semiannually, were payable in Boston. The money to pay them was regularly deposited as they became due with the City Trust Company, by the treasurer of the bankrupt company, at Boston. Since the organization of the bankrupt company in 1902, and the giving of the mortgage by it as above, the Mathews Slate Company had maintained its organization under the direction of the bankrupt company, but had done no other business and had ceased altogether to operate the quarries or mills belonging to it; such operation being from that time conducted wholly by the bankrupt company.

(7) The product of the different quarries and mill was stored at or near them until shipped by direction from the Poultney office as above. None of it appears to have been stored in

Massachusetts. The property of the company in Massachusetts not already referred to consisted of the office furniture in the Boston office only, and some samples of slate there kept. Just what property was kept at the Poultney office does not appear.

(8) From 100 to 150 men were employed at the quarries and mills referred to, not including the mill at Middle Granville, where about 10 men were usually employed.

(9) By the bankrupt's certificate of incorporation, dated May 1, 1902, it is declared that its principal office in the state of New Jersey is in Jersey City in that state. It is also provided that the corporation is to have one or more offices. It had an office in Jersey City from the time of its incorporation, at which office all stockholders' meetings were held. The stock-book was kept at the Boston office as above found. No stock transfer records appear to have been kept at the New Jersey office. It was contended by the respondent, and apparently not denied, that the New Jersey corporation laws required the keeping of all the books at that office.

The above being all the facts which seem to me material upon the question, as I find them established by the evidence, I agree with the referee that they show the bankrupt's principal place of business to have been at Boston and within this district.

The bankrupt had many places of business. Besides its New Jersey office, its Boston office, and its Poultney office, each of the quarries operated and the structural mill as well was a place at which it regularly did business. It does not seem to me that the determination of the question, which of these various places of business was the principal one, can depend upon the amount of property kept or the amount or value of product turned out or the number of men employed at each of them. It might appear that some particular quarry or the mill was principal in this sense; yet to call that particular quarry or the mill the bankrupt's principal place of business would not be in accordance with what is usually understood by that expression. Certainly, any one who desired to have business dealings with the corporation through its representatives would be more likely to go to the Poultney or to the Boston office, even though fewer employees and less property were to be found there, and no production was actually done there. If he went to the Poultney office he would do so because he would be more likely to find there some one authorized to act for the corporation regarding its quarrying and milling operations. These however, though

immediately directed from Poultney, were ultimately controlled from Boston, and at Boston was also transacted a large part of the company's business with which the Poultney office had no concern, a part not less important in its relation to the business of the company as a whole than the part which was done at the quarries, the mills, or the Poultney office. The fact that the supreme direction and control over all the company's operations and dealings, and over its entire plant and property, was exercised from the Boston office, and the fact that in order to the exercise of such supreme direction and control all its operations and dealings, whether relating to production, or to sale, or to the company's finances, if not done at the Boston office, were reported to that office and there passed upon by the appropriate officers, who were regularly there for the purpose of exercising such supreme direction and control, in my opinion makes the Boston office the headquarters of the company, and prevents that office from being regarded as a "mere executive office and selling agency" according to the respondent's contention. If it be said that the supreme authority lay with the stockholders, and that they met only in Jersey City, in the business of the company, their authority could only be exercised through the officers whom they elected. When elected, those officers must have been understood to be regularly performing their duties at Boston.

The facts in this case differ materially from those in the case relied on by the respondent, in Re Elmira Steel Company (D. C.) 109 Fed. 456. The headquarters of the bankrupt in that case could not be said to have been in Philadelphia. On the contrary, as is said in the opinion in Re Magid-Hope Silk Mfg. Co. (D. C.) 110 Fed. 352, "Its office in Pennsylvania seems to have been merely a branch office." The referee found that the business done in that office was less the business of the Elmira Steel Company than the business of its selling agents (109 Fed. 468), and that everything done in Pennsylvania was incidental to what was done at Elmira, N. Y. No similar finding seems to be possible in this case. It may be added that the Elmira Steel Company, organized under the laws of New York, expressly located its principal business office at Elmira by its certificate of incorporation. 109 Fed. 466. If a manufacturing company, under the circumstances shown in that case, does its manufacturing and selling in one state and its banking in another, it may well be considered, as was there

held (109 Fed. 471), that it is the principal place of its principal business that must govern. I do not regard the fact that the present bankrupt did the greater part of its banking in Boston as of itself enough to make Boston the headquarters of the company. The banking done was only one of the component parts of the bankrupt's business. I consider the Boston office to have been the bankrupt's principal place of business, because all the component parts of its business were so far done at or directed from that office, as to make it proper to regard both the other offices, and each quarry, and the mill, as subordinate places of business. * * * [The referee's] report is therefore confirmed and adjudication ordered.[4]

B. Who May Become Bankrupts

1. Natural persons—exception (as to involuntary bankruptcy) in the cases of:

a. Wage-earners

FIRST NAT. BANK OF WILKES-BARRE v. BARNUM

160 Fed. 245

(District Court, Middle District of Pennsylvania. March 9, 1908)

ARCHBALD, District Judge. These are involuntary proceedings, and are resisted by the respondent on the grounds: (1) That he is a wage-earner; and (2) that the petitioners are not creditors. It appears, as to the first, that the respondent is a music teacher, giving lessons on the piano, organ, violin, and mandolin, at 50 cents an hour, earning from $35 to $40 a month, or a little less than $500 a year, some pupils coming to his house for instruction, and others being taught at their own homes. This constitutes his livelihood, in addition to which, however, he has a summer cottage at Harvey's Lake, which he

4—The decision of the District Court was affirmed by the Circuit Court of Appeals for the First Circuit in 144 Fed. 737, 75 C. C. A. 603. The Supreme Court denied an application for a writ of certiorari in 50 L. ed. 1176, 26 Sup. Ct. 764.

Acc. In re Penna. Consol. Coal Co., 163 Fed. 579. See also as to whether it is necessary that a foreign corporation obtain a certificate to do business in the state where the bankruptcy proceeding is brought, In re Duplex Radiator Co., 142 Fed. 906.

rents for $175 a season, and another property from which he gets $150, besides which he has divided up certain land that he owns, and is selling it off in lots. The question is whether under these circumstances he is a wage-earner within the meaning of the law, so as not to be subject to involuntary bankruptcy.

A wage-earner is defined by the bankruptcy act as one "who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." By this it is evidently intended to relieve from adverse proceedings those who, not being engaged in business or trade, depend for a living upon the result of individual labor or effort, without the aid of property or capital. But not all of this class are exempt, as is shown by the limit of $1,500. And the work done must be such as is compensated by wages, salary, or hire, other earnings not being put in the same category. These terms mean much the same thing, and are no doubt collectively used in order to cover the different possible kinds of employment comprehended within the general idea. Wages, as distinguished from salary, are commonly understood to apply to the compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, or season. Commonwealth v. Butler, 99 Pa. 535; Lang v. Simmons, 64 Wis. 525, 25 N. W. 650; Campfield v. Lang (C. C.) 25 Fed. 128; Henry v. Fisher, 2 Pa. Dist. R. 7; Louisville, etc., R. R. v. Barnes, 16 Ind. App. 312, 44 N. E. 1113; Fidelity Ins. Co. v. Shenandoah Valley R. R., 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858; State v. Haun, 7 Kan. App. 509, 54 Pac. 130. And also by the piece. Pennsylvania Coal Co. v. Costello, 33 Pa. 241; Swift Mfg. Co. v. Henderson, 99 Ga. 136, 25 S. E. 27; Ford v. St. Louis R. R., 54 Iowa, 728, 7 N. W. 126; Seider's Appeal, 46 Pa. 57; Adcock v. Smith, 97 Tenn. 373, 37 S. W. 91, 56 Am. St. Rep. 810. But not by the job. Heebner v. Chave, 5 Pa. 115; Berkson v. Cox, 73 Miss. 339, 18 South. 934, 55 Am. St. Rep. 539; Morse v. Robertson, 9 Hawaii, 195; Henry v. Fisher, 2 Pa. Dist. R. 7. Nor including profits on the services of others. Smith v. Brooke, 49 Pa. 147; Sleeman v. Barrett, 2 H. & C. 934; Riley v. Warden, 2 Exch. 59. Neither is it so broad a term as "earnings," which comprehend the returns from skill and labor in whatever way acquired. People v. Remington, 45 Hun (N. Y.) 338; Matter of Stryker, 73 Hun, 327, 26 N. Y. Supp. 209; Id., 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; Jenks v. Dyer, 102 Mass. 236; Nuding v. Urich, 169 Pa. 289,

32 Atl. 409; Goodhart v. Pennsylvania R. R., 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705; Hoyt v. White, 46 N. H. 45. Indeed the act itself in exempting wage-earners recognizes that there are other kinds. Salary, on the other hand, has reference to a superior grade of services. Hartman v. Nitzel, 8 Pa. Super. Ct. 22. And implies a position or office. Bell v. Indian Live Stock Co. (Tex.) 11 S. W. 346. By contrast, therefore, "wages" indicate inconsiderable pay for a lower and less responsible character of employment. South Alabama R. R. v. Falkner, 49 Ala. 115; Gordon v. Jennings, 9 Q. B. Div. 45. Where salary is suggestive of something higher, larger, and more permanent. Meyers v. N. Y., 69 Hun, 29, 23 N. Y. Supp. 484; White v. Koehler, 70 N. J. Law, 526, 57 Atl. 124; State v. Duncan, 1 Tenn. Ch. App. 334; Palmer v. Marquette Rolling Mill, 32 Mich. 274. The word "hire" is rather associated with the act of employment than the reward for services done; and in the latter connection is more on the plane of wages than of salary, although in a sense it comprehends both; and is also applied to engaging the use of property. We hire a coachman, a gardener, or a cook; or a carriage to take a ride. And may also be said to hire a superintendent, a bookkeeper, or a clerk, although it would seem more correct, in the latter instances, to say engage or employ. In some communities, a farm hand is called a hireling, without intending any reflection, although in general speech the term is one of reproach. As further defining its use, a laborer, according to Sacred Writ, is said to be worthy of his hire. And coming up from the people, as the word thus does, it is sometimes applied, out of place, to the securing of professional services, as where one is said to hire a lawyer, a doctor, or a person of that class.

The cases directly decided under the bankruptcy act confirm these views. Thus, it is held that a person doing hauling with his team by the day—which affords a good example of what may in strictness be termed a hiring—is a wage-earner. In re Yoder (D. C.) 11 Am. Bankr. Rep. 445, 127 Fed. 894. Although it is said that, in allowing the priority given to wages by the act, the amount due for the use of the team must be distinguished from that for the services of the person himself. In re Winton Lumber Co., 17 Am. Bankr. Rep. 117. So money due for piece work, paid weekly, is held to be wages. In re Gurewitz, 10 Am. Bankr. Rep. 350, 121 Fed. 982, 58 C. C. A. 320. And a bookkeeper, in the employ of others, receiving a salary of $65 or

$70 a month, is a wage-earner within the meaning of the law. In re Pilger (D. C.) 9 Am. Bankr. Rep. 244, 118 Fed. 206. And so, as we may assume—applying the same principle—would be the chorister of a church, paid a specified yearly sum for his services. Catlin v. Ensign, 29 Pa. 264. Or a traveling salesman receiving a percentage commission on the amount of his sales. Hamberger v. Marcus, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719. But not a factor or broker, engaged in the business of selling goods on commission. Id. Nor a mill-owner, who saws lumber for others at so much a thousand. Campfield v. Lang (C. C.) 25 Fed. 128. Nor one who builds a house or other structure, by contract, even though he does a part of the work himself. Berkson v. Cox, 73 Miss. 339, 18 South. 934, 55 Am. St. Rep. 539; Henry v. Fisher, 2 Pa. Dist. R. 7; Morse v. Robertson, 9 Hawaii, 195. Nor one who tows a canal boat. Ryan v. Hook, 34 Hun, 191. Or threshes out grain by the job. Johnston v. Barrills, 27 Or. 251, 41 Pac. 656, 50 Am. St. Rep. 717. Nor are the fees of lawyers, physicians, and the like to be classed as wages. Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. ed. 310; People v. Myers (Sup.) 11 N. Y. Supp. 217. Nor the debts due to a blacksmith from his customers for his services. Tatum v. Zachry, 86 Ga. 573, 12 S. E. 940. Nor is a school teacher a laborer or servant; however, we may speak of one, at times, as being hired. School District v. Gautier, 13 Okl. 194, 73 Pac. 954.

From these considerations, as it seems to me, but one conclusion can be drawn. A person, like the respondent, giving music lessons at so much an hour, is not a wage-earner within the meaning of the act. Teaching is a profession, denoting a nicer relation and involving a finer character of work, and entitled, like that of the lawyer, doctor, the engineer, the architect, or the minister, to be regarded as upon a higher plane. His work is mental, not physical. He labors with his head, not his hands. And while that may not be distinctly conclusive, it has its weight. He is the tutor, or instructor, of his pupil, not his servant; his, of the two, being the master mind. This is not to say that one who works for a salary, like the teachers in our public schools, may not be wage-earners, within the meaning of the bankruptcy law. The fact of being under a salary makes a difference, and brings the case squarely within the act, although it may be noticed in passing that, in the school laws of the state, teachers are said to be appointed, not employed or

hired. But the compensation received by the respondent, in the present instance, is certainly not a salary. Neither is it wages. And notwithstanding the misuse of the term, alluded to above, neither can he be said to work for hire. He is simply paid a stipulated sum or stipend in return for the instruction which he gives, which he holds himself out as competent to impart, being engaged so to do by his pupils or their parents, but not hired, any more than the lawyer, doctor, or others in professional life. The returns from his teachings may be earnings, which as we have seen is a comprehensive term, but not wage-earnings, and so not effective to exempt him from liability here. * * * [On the second ground of objection, that the petitioners were not creditors, the petition was dismissed.] [5]

b. Farmers

BANK OF DEARBORN et al. v. MATNEY

132 Fed. 75

(District Court, W. D. Missouri. April 16, 1904)

PHILIPS, District Judge. This is a petition in involuntary bankruptcy. There is no question made, if the defendant is subject to the operation of the bankrupt act (Act July 1, 1898, c. 541, § 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), that he had not committed acts of bankruptcy at the time of the filing of the petition against him. The question of fact and law raised by his answer is as to whether he was chiefly engaged in farming or the tillage of the soil. * * * The controlling facts will appear in the following discussion:

It is not every person engaged in farming or the tillage of the soil who is exempt from the operation of the bankrupt act, but it is a person "engaged chiefly in farming or the tillage of the soil." The courts are generally agreed that the term "farming" is not synonymous with a tiller of the soil. To constitute one a farmer it is not essential that he in person should till the soil, or that his operations should be limited to agricultural planting, sowing, and cultivation of the soil. Yet the context indicates that the terms "farming" and "tilling of the soil"

5—*Cf.* In re Yoder, 127 Fed. 894; In re Pilger, 118 Fed. 206; In re Hurley, 204 Fed. 126.

are more or less closely allied. The word "farming" was doubtless employed in the act as a generic term, in a comprehensive sense. The lawmakers, coming from the wide extent of the Republic, with its diversified agricultural adaptability, are to be presumed to have had in mind their knowledge of the methods in different localities of conducting the business of farming. It is therefore reasonable to conclude that the term was not limited merely to the production of grains and grasses and the like. The farmer may cultivate all or a part of his lands. He may be general or special. He may devote his cultivation to the production of corn, or wheat, oats, or rye, or grasses, whichever, in his judgment, may be the more useful and profitable. He may include also with these breeding, feeding, and rearing of live stock, embracing cattle, horses, mules, sheep, and hogs, for domestic use and for market. If he find it more profitable to feed his agricultural products or his grasses to live stock than to rely upon marketing the surplus, he may not be limited to the quantity of live stock for such purposes to what he may breed or rear on his farm. For this purpose he may rely entirely upon the purchase of such live stock from his neighbors or on the market, and utilize his farm products in feeding and fattening such "feeders" for market. Neither, in my opinion, should the act be so construed as to restrict the farmer entirely, under all circumstances and conditions, to the corn and hay and grasses he may produce for rearing such feeders and preparing them for market. In other words, where he relies largely upon his pasture lands for grazing his cattle, and his crops of corn may not be sufficient to carry them through the particular winter and the feeding season, he may supplement these by purchasing from without sufficient corn, and the like, to meet the requirement. But certainly there should be apparent such relation between his method of farming and the buying and feeding of cattle, hogs, and the like, for market, as to reasonably indicate that his farming is not made principally subsidiary to the business of buying and selling cattle. So that, if his chief business is that of thus trading in cattle, using his lands as a mere feeding station, relying upon the purchased feed from the market for preparing them for sale much more than on his agricultural products, he may cross the dividing line between farming as his chief business and trading in cattle as his chief source of livelihood. No hard and fast rule can safely be laid

down by the courts indifferently applicable to all cases. Each must depend more or less upon its own particular facts.

The case of In re Thompson (D. C.) 102 Fed. 287, principally relied upon by the defendant, is in accord with the views entertained by this court of the limit of indulgence to be accorded to the farmer. It is observable that the learned judge made the case turn upon the fact that, taking into consideration the quantity of land in cultivation and its product, and the quantity of stock raised and bought, there was not such disproportion between the defendant's farming and cattle trading operations as to exclude him from the protection of the bankrupt act.

In Re Mackey (D. C.) 110 Fed. 355, the court has furnished a most sensible and just rule for determining whether the person be engaged chiefly in farming or other business run in connection therewith. The court said:

"A person engaged chiefly in farming is one whose chief occupation or business is farming. The chief occupation or business of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood, or as the means of acquiring wealth, great or small. That one may principally devote his physical exertions or his time to a given pursuit, while one of the factors entitled to consideration, is not in all cases determinative of the question whether that pursuit is his chief occupation or business. * * * If such dealing is of principal concern to him, and chiefly relied on by him for his subsistence and financial advancement, and if he treats it as of paramount importance to his welfare, he would not be within the category of persons chiefly engaged in farming, even were his farm to yield him some profit. * * * It is evident that it is impracticable, if not impossible, to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming, and that each case must be decided on its own circumstances. It may, however, legitimately be stated, generally, that, if it appears in a given case that one's occupation or business which is of principal concern to him, not ephemeral, but of some degree of permanency, and on which he mainly relies for his livelihood and financial welfare, be other than farming, he is not 'a person engaged chiefly in farming.' No one should be held exempt from the provisions of the bankrupt act on this ground unless it satisfactorily appears that he comes within the exception."

The same test is applied by the court in Wulbern et al. v. Drake, 120 Fed. 495, 56 C. C. A. 645, as follows:

"It does not matter if the person may have other business or other interests, if his principal occupation is that of an agriculturalist—if that is the business to which he devotes more largely his time and attention—which he relies upon as a source of income for the support of himself and family, or for the accumulation of wealth."

In the case at bar it is true that the defendant grew to manhood on his father's farm. After he attained his majority and began to work for himself, his father had a store on the homestead, and was postmaster there, and at one time ran a mill. He gave his principal attention to his store and the post office. The farm and homestead, consisting of about 385 acres, were run by the defendant and his brother, accounting to the father for one-half of the crops. The defendant from the outset manifested a passion for dealing in cattle, buying and selling, so much so that it was conceded in argument that up to 1893 he dealt in the buying and shipping of cattle to such an extent that he became largely indebted for moneys borrowed to exploit this business. Up to 1900 he and his brother continued to occupy the farm as tenants under the father; so that during that period his farming operations, as such, consisted in the use of 192½ acres of land of his father, on which he paid one-half of the crop as rental.

* * * * * * * * *

He bought some more land in the early part of 1903, which made the amount of land he owned and the leased land, in 1903, something over 600 acres. The result of his business operations was that in August, 1903, when the petition in bankruptcy was filed against him, he was indebted to the extent of over $52,000. It is conceded that over $39,000 of this indebtedness is referable to his dealings in live stock and the purchase of corn for their feeding. The land owned by him, 295 acres, was valued at about $65 an acre, which would leave $5,000 or $6,000 representing his land after taking out the purchase money.

* * * It would appear that, while the defendant's total crop and pasturage for 1901 amounted to about $1,770, an examination of his checks at one bank shows that he spent $8,906 that season for corn, while his mortgages indicate that he must have expended about $6,700 for stock to feed.

There is some difficulty in arriving at the exact history of the purchase of all cattle covered by his various mortgages. * * * The evidence shows that under ordinary husbandry the annual expense of conducting the defendant's farming operations would not exceed $1,200. The evidence shows, from his accounts with the banks, that during his operations he did business with the banks aggregating $94,622.19, made up as follows: First National, St. Joseph, $42,195.66; Bank of Dearborn, $44,426.53; Tootle-Lemon Bank, $8,000. This extraordinary amount of business done by such a farmer with the banks excites special wonder as to how such extensive financial operations can consist with the idea that the defendant was chiefly engaged in farming on such a quantity of land. They can be traced in this evidence to no other source than his specialty in dealing in live stock.

The defendant claims in extenuation of his large indebtedness at the banks that the bulk of it was created prior to 1893, and that he has been carrying much of it since, paying interest thereon. He seems to have kept books prior to that time, but none since. He furnishes in his evidence no data from which the approximate amount of his indebtedness can be ascertained in 1893. * * *

The state of the proofs is such, relying as it does largely upon facts obtained from the defendant's testimony, when he kept no books since 1893, as to render it impossible to ascertain from the evidence exactly the times of his purchases and the number and cost of live stock actually purchased by him on the market. The following summary is gathered from his own statement: During the period preceding 1900 of, say five years, he purchased 6 car loads of cattle for immediate shipment, the car loads averaging from 16 to 18 head of cattle. He also during that time purchased, fed, and sold sheep to the extent of a car load a year. In 1900 he purchased 10 mules, colts, which were at once sold; price not stated. He also purchased between 50 and 60 calves, taken onto the farm. He shipped one car load of cattle and hogs, three cars of hogs, three cars of cattle, two other car loads of stock, not specially designated by the evidence. In 1901 he bought 10 mule colts, $57 each, which he kept from a year and a half to two years, and sold for from $125 to $175 per head. He bought 55 or 57 calves at $14 per head, which went onto the farm. He shipped one car load of cattle and hogs, and one car load of cattle, hogs, and sheep.

In 1902 he bought 140 calves at an average price of $21.25, out of which he at once sold 40 heifer calves; and shipped two car loads of cattle and a car load of sheep, hogs, and cattle. He also purchased 80 shoats (some of his hogs died of cholera); 3 mules of Guyton & Harrington, 3 from Jack Hahn, 1 from Milt Gustin (one of which he traded to one Black for a pair, paying $155 to boot), and 2 mules bought in Kansas City, for the freight on which he drew his check on the Bank of Dearborn, and which cost $400. The probable estimate of the cost of the 10 mules would be in the neighborhood of $1,500. He also had about 100 head of Hereford and Black yearling steers, mortgaged October 31, 1902. These were probably calves in 1901, but he testifies that he only bought 55 or 57 calves that year, leaving it inferable that he must have purchased somewhere about 40 or 43 not accounted for as yearlings in 1902; and it is inferable that they were paid for with the proceeds of the mortgage of $2,860 which covered them.

It does seem to me, in view of the conspicuous, controlling facts in this record, that the defendant's case is brought within the rule given by the court, *supra,* that where "one's occupation or business which is of principal concern to him, not ephemeral, but of some degree of permanency, and on which he mainly relies for his livelihood and financial welfare, be other than farming, he is not 'a person engaged chiefly in farming.'" Beyond question the defendant's energies of body and mind and his time were principally devoted to the matter of buying and marketing live stock as the chief source of his livelihood, and to which he chiefly looked for financial success. When he rented lands, it was solely to get more pasture for the stock he was buying and preparing for market. His crops cultivated bore comparatively little relation, in proportion, to the amount he bought for his feeders. The great bulk of his indebtedness was for moneys borrowed for his cattle speculation. That was his permanent, specific business. His farming was merely auxiliary—the incident, and not the principal thing. Banks and others loaning him money gave him credit on his cattle, and took mortgages thereon. His preferred creditors, whose chattel mortgages are involved in this controversy, were secured on the live stock he purchased. To hold such a debtor, with his lands all covered by mortgages, owing $40,000 growing out of buying and feeding live stock, is chiefly engaged in farming, it does seem to me would be to yield to a sentiment, rather

than the spirit of the bankrupt act, which is designed to secure equality among creditors. Where such a debtor seeks protection under the exemption of the statute, he should present tangible, reliable evidence to bring himself within the exception. This the defendant failed to do to the satisfaction of the court.

It results that the petition to have the defendant adjudged a bankrupt should be sustained.[6]

c. What time governs as to classification.

FLICKINGER v. FIRST NAT. BANK

145 Fed. 162, 76 C. C. A. 132

(Circuit Court of Appeals, Sixth Circuit. May 1, 1906)

SEVERENS, Circuit Judge. This cause comes here on an appeal from an order of the district court adjudging Flickinger a bankrupt. * * *

Upon the merits, the first question arises upon the contention that Flickinger was exempt from bankruptcy proceedings under § 4b of the act of July 1, 1898 (c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), because he was a person chiefly engaged in farming. The evidence shows that for some years prior to August, 1903, Flickinger resided at Galion, Crawford Co., Ohio, and was actively engaged in the business of the Flickinger Wheel Company, a manufacturing corporation employing a great number of men, and located at that place, of which he was a stockholder, director, the president, and general manager. He had also owned and cultivated a farm in Logan county, which with the implements and stock upon it was sold by the assignee for $21,000, and which was managed by him, or under his direction, and on which he had a house, which was occupied by him and frequently by his family when he visited it for the purpose of giving direction to the cultivation and management of the farm. He went there once or twice

6—*Cf.* In re Taylor, Mattoon Nat. Bk. v. First Nat. Bk., 102 Fed. 728, 42 C. C. A. 1; In re Hoy, 137 Fed. 175; Rise v. Bordner, 140 Fed. 566; Gregg v. Mitchell, 166 Fed. 725, 92 C. C. A. 415; In re Dwyer, 184 Fed. 880, 107 C. C. A. 204; American Agricultural Chem. Co. v. Brinkley, 194 Fed. 411, 114 C. C. A. 373. As to a corporation engaged in farming, see In re Sugar Co., 129 Fed. 640; as to a partnership, H. D. Still's Sons v. Bank, 209 Fed. 749, 126 C. C. A. 473.

a week, and telephoned his orders when he was otherwise engaged. He bought whatever was bought upon the farm, and sold all its products. In August, 1903, the wheel company went into the "Wheel Trust," so called, after which he was not actively occupied in its affairs. In January, 1904, the wheel company went into the hands of a receiver appointed by the court of common pleas of Crawford county. On May 3, 1904, he made a general assignment for the benefit of creditors. The petition in bankruptcy was filed September 2, 1904. Down to the time when he made his assignment, he had made occasional visits to his farm in Logan county, and gave direction regarding its management, much as he had done while managing the business of the Flickinger Wheel Company. He says that he had no other business than farming after his company went into the hands of the receiver, and that he had the sole and exclusive management of the farm thereafter. His statement is not contradicted and is confirmed by other witnesses, and it does not appear that he intended to engage in any other business. It is difficult to see how, after he made a general assignment on May 3, 1904, which, of course, conveyed his farm, he could properly be said to be chiefly engaged in farming. Four months passed before the petition in bankruptcy was filed. We think it could not be held that he was engaged in farming when the petition was filed. The farm was sold on July 17, 1904, by the assignee, who at that time was in control of it. We think the fair conclusion from the facts shown would be that prior to the time when the business of the wheel company went into the hands of the receiver (January, 1904), Flickinger was engaged in two kinds of business—manufacturing and farming—of which the former was the chief; that after that time he was not engaged in that business, and that farming became his chief, in fact his only, occupation, and continued such until his assignment in May, 1904.

The decisive question would therefore seem to be whether § 4b refers to the time when an act of bankruptcy is committed for the purpose of determining the occupation, as some of the courts in bankruptcy have held, or to the time of filing the creditors' petition, which seems to be the natural meaning of the words employed. It was held In re Luckhardt (D. C.) 101 Fed. 807, and In re Mackey (D. C.) 110 Fed. 355, that the time referred to by this exception in the act is the time when the act was done which was the ground of the adjudication.

This construction was adopted, because it was thought necessary in order to defeat attempts which bankrupts might make to escape the consequences of their acts by running under the shelter of an excepted occupation. If the language used is fairly susceptible of this interpretation, the argument from inconvenience would justify the proposed construction. This question was presented in the case of In re Pilger (D. C.) 118 Fed. 206, before Judge Seaman, who expressed doubt about it, but passed it by, holding that it was unnecessary to decide it in that case. In the case entitled In re Matson (D. C.) 123 Fed. 743, Judge Archbald, in deciding whether the respondent should be adjudged bankrupt, referred the question of occupation to the time when he was passing upon it; but we do not know whether the question was debated before him or not. Judge Brown, in construing the words in § 4b, which include certain corporations and exclude others from the operation of the law, said:

"These words must be interpreted in the sense in which they are commonly used and received, and not in any strained or unnatural sense, for the purpose of including or of excluding particular corporations."

In re N. Y. & W. Water Co. (D. C.) 98 Fed. 711, 713.

A majority of the court is inclined to think that the statute should be regarded as having reference to the conditions existing at the time when the act of bankruptcy is committed. Upon this construction, the facts would require a finding that the respondent was within the exception.

There are no other questions which require consideration. The order must be reversed, with costs to the appellant.[7]

TIFFANY v. LA PLUME CONDENSED MILK CO.

141 Fed. 444

(District Court, M. D. Pennsylvania. October 20, 1905)

ARCHBALD, District Judge. The controversy here is one of jurisdiction. The respondent, a New Jersey corporation,

7—An application for a writ of certiorari was denied by the United States Supreme Court in 203 U. S. 595, 51 L. ed. 332, 27 Sup. Ct. 783.

Acc. In re Leland, 185 Fed. 830; In re Folkstad, 199 Fed. 363, and see note in 11 MICH. LAW REV. 246.

But see In re Matson, 123 Fed. 743.

denies by its plea that it has had its principal place of business within the district for the greater portion of six months preceding the institution of these proceedings, as averred in the petition, and as is essential; there being no claim of residence or domicile. Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]. The evidence shows that while incorporated under the laws of New Jersey—and, in order to comply with them, having a nominal office at Camden in that state—the company was engaged in the business of manufacturing and selling condensed milk at La Plume and at Brooklyn, Pa., in this district, from the early part of 1903 up to October 6, 1904, when its plant at the latter place was destroyed by fire; that at the other having been sold the previous January. It also had during the same period a central office at Scranton, from which the management of the company was directed; the whole of its corporate business having been conducted in these three places. The fire, however, broke up what was left of its manufacturing business, which was not afterwards resumed. But it still retained its central office at Scranton, and from it, through its treasurer as its executive officer, with the assistance of a regularly employed stenographer, proceeded to settle up its affairs. An adjustment of the insurance was secured, amounting to some $14,000, a considerable portion of which was not paid until the latter part of November; the relics of the fire were disposed of; accounts aggregating about $5,000 were collected in, the money received from these several sources being deposited in a local bank; and sundry bills which were due were compromised and paid. The manager of the burned condensary was also retained until the middle of November, and a man put in charge of what was left of the property for some two months after that. This was the situation on February 2, 1905, when the present petition was filed; the debts due to the petitioning creditors having been incurred in the course of its condensing business.

There can be no question upon this showing as to the principal place of business of the company being within the district, not only for the greater part, but the whole, of the six months necessary to give jurisdiction. In re Marine Machine Co., 1 Am. Bankr. Rep. 421, 91 Fed. 630; In re Brice, 2 Am. Bankr. Rep. 197, 93 Fed. 942; In re Elmira Steel Co., 5 Am. Bankr. Rep. 484; Dressel v. North State Lumber Co., 5 Am. Bankr. Rep. 744, 107 Fed. 255; In re Mackey, 6 Am. Bankr. Rep. 577,

110 Fed. 355; In re Magid-Hope Silk Co., 6 Am. Bankr. Rep. 610, 110 Fed. 352. The fact is that (not counting the nominal office at Camden, N. J.) not only the principal part, but substantially the whole, of its business was conducted here. It is contended, however, that after October 6th, the date of the fire, it was engaged in nothing but liquidation, which is not the doing of business within the meaning of the law, the business required to be done, either by a corporation or an individual, in order to give jurisdiction, being none other than that by which either is made liable to bankruptcy, and that, the respondent here having been out of such business for nearly four months of the six next preceding the filing of the petition, the court has no jurisdiction over it, and the proceedings cannot be maintained.

The question involved in this contention is not altogether a new one, although the particular form which it assumes here may be. *"Fuit agree,"* as it is said in Heylor v. Hall, Palmer, 325 (1619-1629), *"q si un exercise traffique, e donque devient indebted, e apres desert son trade, e liue in le pais sans ascu trade, mes sur son tre, e luy conceale de ses Creditors, uncore est Bankrupt quia vive p son trade, qnt le Debt grow."* (It was agreed that if one engages in traffic and thereby becomes indebted, and afterwards abandons his trade and lives in the country without any trade, but upon his gains, and conceals it from his creditors, yet is he a bankrupt, because he lives by means of the trade out of which the debt grew). In line with this, in Meggott v. Mills, 12 Mod. 159, s. c. Ld. Raym. 286, a person exercising the trade of a victualer, in which he was liable to bankruptcy, contracted a debt, and subsequently quit the trade and became an innkeeper, after which he committed an act of bankruptcy, and it was held that, though a man quit his trade, he may be bankrupt for the debts that he owed before. And in Ex parte Bamford, 15 Vesey, 449, Lord Eldon declared that a commission in bankruptcy could be sustained beyond doubt by an act of bankruptcy committed after retiring from trade; the debts contracted during trade remaining unpaid. To the same effect are Dawe v. Holsworth, Peake, 64, Doe ex dem. v. Hayward, 2 Car. & Payne, 134, and Bailie v. Grant, 9 Bing. 121; it being stated in the latter case by Tindal, C. J., that the point was settled. It seems to have been carried one step further, or at least a new form given to it, in Ex parte Griffiths, 3 De G., M. & G. 174, where it was said by Knight Bruce, L. J.: "A trader, who, after having become indebted, leaves off trade,

is not to be heard to say to his creditor that the trading has been left off, if a question arises whether the debtor can or cannot be, as a trader, made bankrupt." And Lord Alverstone, C. J., In re Worsley, 1 K. B. (1901) 309, similarly declares that, so long as a debtor does not pay the debts which he contracted while engaged in trade, he is to be regarded as still so engaged. The doctrine of these cases was adopted and applied in this country, in Everett v. Derby, 5 Law Rep. 225, Fed. Cas. No. 4,576, a case arising under the bankruptcy act of 1841. It was there objected that the respondent was not liable to bankruptcy, not being at the time of the alleged acts, nor at the time of the filing of the petition a merchant actually using the trade of merchandise, nor yet a retailer, so as to bring him within the law. But it was held by Judge Ware, on the authority of what was said by Lord Eldon in Ex parte Bamford, *supra,* that the proceedings should be sustained.

A case under the present act, more nearly approaching to the one in hand, is to be found In re Luckhardt, 4 Am. Bankr. Rep. 307, 101 Fed. 807. The bankrupt there, who was engaged in the retail boot and shoe trade, abandoned it and went to farming; and, a petition having been filed against him, it was claimed that he was exempt. In holding him liable, however, it is said by Hook, J.:

"The exemption from involuntary proceedings in favor of wage earners and persons engaged chiefly in farming or the tillage of the soil is not intended as a means of escape for insolvents, whose property was acquired and whose debts were incurred in other occupations recently engaged in. If the right of the creditors to institute involuntary proceedings may be thus defeated by the debtors within the period allowed for the commencement of such proceedings, it could be defeated by a change of occupation made coincidently with the commission of an act of bankruptcy, and an insolvent debtor would thus be permitted to dispose of a stock of merchandise or other property, distribute the proceeds thereof in such manner as pleased him, immediately become for the time being a tiller of the soil, or a wage earner, * * * and so avoid the operation of the bankruptcy act. Such a result is not in accord with the purpose nor within the spirit of the law. A petition in an involuntary proceeding must be filed within four months after the commission of the act of bankruptcy relied on, and, if an insolvent, who is engaged in an occupation which is within the purview

of the law, has committed an act rendering him amenable to its provisions, and desires within such period to adopt one of the callings favored by the law and exempted from its operation in respect of involuntary proceedings, he should not be permitted to carry with him the property previously accumulated, to the defrauding of pre-existing creditors. The excepted occupations are not designed as a refuge for insolvent debtors, laden with property and fleeing from other callings. The right of the creditors to proceed within the period limited after the commission of an act of bankruptcy cannot be thus defeated by the debtor."

Closely in point is In re White Mountain Paper Co., 11 Am. Bankr. Rep. 491, 127 Fed. 180, where a corporation, organized under the laws of New Jersey for the purpose of manufacturing pulp, acquired land and erected a plant in New Hampshire for the purpose of engaging in that business, but became involved before any direct manufacturing was done. In holding it liable to proceedings in bankruptcy, notwithstanding the latter circumstance, it is said by Aldrich, J.:

"The question * * * does not depend upon * * * whether the corporation was at the particular time of the petition actually engaged in * * * the process of manufacturing. My impression would be that the language 'engaged principally in manufacturing * * * pursuits' was used for the purpose of describing the kind of a corporation which may be put into bankruptcy, and that it was not intended that the operation of the bankrupt law upon a corporation of a kind within the meaning of the statute should depend upon the question whether it was actually engaged in manufacturing at the particular time when the petition is filed."

This case was affirmed on appeal (11 Am. Bankr. Rep. 633, 127 Fed. 643, 62 C. C. A. 369) upon the somewhat narrower ground that, in the opinion of the court, manufacturing, under the evidence, had in fact begun, although only in its earlier stages—a view which, while it may not adopt, does not detract from, that expressed by the lower court. Finally, In re Moench Co., 12 Am. Bankr. Rep. 240, 130 Fed. 685, 66 C. C. A. 37, where the corporation at the time of filing the petition was in the hands of receivers appointed by a state court, it was contended, similarly to what it is here, that the company, having ceased to do business when the receivers were appointed, was not within the provisions of the act. But it was said by La-

combe, J., speaking for the Court of Appeals of the Second Circuit:

"No case is cited in support of this proposition, and, in the absence of authority, we shall be unwilling to hold that a corporation could thus easily avoid the operation of the bankruptcy act by making a general assignment, or by securing the appointment of receivers, or by ceasing to do any business, before its creditors filed a petition against it."

While neither of the authorities so cited may be in exact correspondence with the case in hand, the principle to be deduced from them, applicable thereto, is clear. The liability of a person, whether natural or artificial, to bankruptcy is to be judged by the character of the pursuit in which such person was engaged at the time the debts due the petitioning creditors were incurred, with respect to which it may be conceded that, as to a corporation, its actual business is to be considered, and not that which it might possibly have undertaken by virtue of authorized but unexercised powers. In re New York & W. Water Co., 3 Am. Bankr. Rep. 508, 98 Fed. 711; In re Tontine Surety Co., 8 Am. Bankr. Rep. 421, 116 Fed. 401. As to such debts, an individual does not lose his previous character by ceasing to carry on the business in which they were contracted and turning to another, in which he is not liable to bankruptcy, and neither does a corporation, by stopping business altogether and going into liquidation, voluntary or involuntary. In either case, as to debts previously contracted, the business character of such person, in the contemplation of the law, remains the same. Wherever, therefore, the principal place of business of such person has been established for the greater part of six months preceding the filing of the petition, and without regard to the business there carried on, as to debts previously contracted, proceedings may be maintained.

This is not to deny the force of those cases which hold that, where a person ceases to belong to one of the excepted classes, he becomes liable according to the class in which he is found at the time proceedings are instituted. In re Matson, 10 Am. Bankr. Rep. 473, 123 Fed. 743; Hoffschlaeger v. Young Nap, 12 Am. Bankr. Rep. 521. It is simply that a different principle applies. Nor does it seem to make any difference that the debts due the petitioning creditors were incurred before the change (Butler v. Easto, Doug. 295), provided only the act of bankruptcy has been committed since. Bailie v. Grant, 9 Bing.

121. As declared in the latter case, "a debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade," is "a subsisting debt for every purpose, and subject to every consequence which belongs to a debt originally contracted during trade." But without enlarging upon this, which is somewhat obiter, whatever be the rule where a change is made from an exempt to a nonexempt class, there can be no question as to what is the rule here.

The exceptions to the report of the referee are overruled, the issue raised by the plea is found in favor of the petitioners, and the respondent is directed to answer over within 10 days.[8]

2. PERSONS OF ABNORMAL LEGAL STATUS

a. Infants

In re WALRATH

175 Fed. 243

(District Court, N. D. New York. January 4, 1910)

RAY, District Judge. The above-named bankrupt is an infant under the age of 21 years, and it is alleged that for such reason this court has no jurisdiction to grant a discharge in this proceeding. Henry L. Walrath filed his voluntary petition in bankruptcy on or about May 26, 1909. An adjudication was made, and the matter referred to C. L. Stone, Esq., one of the referees in bankruptcy. The first meeting of creditors was held July 19, 1909, and Frank E. Parsnow, a creditor, appeared and filed his claim in the sum of $939.40, and same was duly proved and allowed. A. H. Sheldon was appointed trustee of the estate of said bankrupt, and Parsnow participated in such appointment. The trustee duly qualified and acted. Parsnow demanded an examination of such bankrupt, and such examination was had. It appears there were no assets. No other creditor proved a claim. September 15, 1909, the bankrupt filed his petition in due form, asking a discharge under the bankruptcy law. The referee has filed his certificate of conformity and recommends a discharge. On the return of the order to show cause on such petition for a discharge, said Frank E.

8—*Acc.* In re Burgin, 173 Fed. 726; In re Wakefield, 182 Fed. 247; see note in 23 HARV. LAW REV. 393.

Parsnow, who had proved such claim, filed specifications of objection to the discharge of the bankrupt on the ground that, he being an infant, the court has no jurisdiction to grant such order.

The claim of Parsnow proved and allowed, and which gives him standing in court, is the amount of a judgment in his favor against Walrath in an action for negligence, from which no appeal has been taken. The said objecting creditor has not at any stage moved to open the adjudication or dismiss the petition instituting the bankruptcy proceedings. Infants are liable for some debts, and they and their property may be bound in judgment therefor. This claim of Parsnow is one of that class. It has been so adjudicated by a court of competent jurisdiction. Walrath, the bankrupt, owes the debt. He owed the debt when the proceeding in bankruptcy was instituted. The law has so adjudged. The bankruptcy act, "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898 (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3418]), as amended February 5, 1903 (32 Stat. 797, c. 487), and June 15, 1906 (34 Stat. 267, c. 3333), provides in § 1 that "'debt' shall include any debt, demand or claim provable in bankruptcy," and in § 2 that the courts of bankruptcy shall have power to "adjudge persons bankrupt who," etc., and in § 4 that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt," and in § 63 that "debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him," etc.

This was a provable debt, and was proved by this objecting creditor, and duly allowed. The act nowhere excepts infants from its provisions or benefits. The language is as broad as it could have been made in general terms to include infants, and there is nothing elsewhere in the act indicating that they are not included in the language quoted. There is no ground of public policy for excluding them, or so construing the act as to exclude them, where they owe debts. This court therefore holds that Henry L. Walrath was, although an infant, entitled to the benefits of the act, and that he was properly adjudicated a bankrupt. The proceedings had are neither void nor voidable.

In re Carl S. Brice, 2 Am. Bankr. Rep. 197, 93 Fed. 942; Collier on Bankruptcy (7th ed.) 96, 97, where it is said:

"An infant, either petitioning or petitioned against, must appear to have capacity to owe. It is yet a mooted question, however, whether an infant who has either held himself out and traded as an adult, or who alleges only debts for necessaries, cannot be adjudged bankrupt on his own petition. The better opinion seems to be that he can."

This infant in respect to this debt was under no disability. He owed the debt, and his property was liable for its payment. Suppose he had owed ten debts of the same class and grade, with only property sufficient to pay 50 cents on the dollar; is there any good reason why he should not have been adjudged a bankrupt, and his property applied in payment of all *pro rata*? Or, should the first one to obtain judgment and execution be allowed to sweep the deck, in the very face of the act and its declared purpose? Under the act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440), where, as here, infants were not exempted from its operation, it was held they were entitled to its benefits. In re Book, 3 McLean, 317, Fed. Cas. No. 1,637. It is unquestionably true that an infant cannot be adjudicated a bankrupt, unless it appears that he "owes" debts. The word "owe" means something: That he is now legally liable for its payment, and that it may be enforced. This being so, he is entitled to his discharge in this proceeding instituted for that purpose; no other ground of objection appearing. "Any person who owes debts" is entitled to the benefits of the act, and it cannot be successfully contended that an infant is not a person.

But the validity of these proceedings cannot be challenged here collaterally. The petitioner has been adjudicated, and jurisdiction established. That judgment stands unimpeached. This is an independent proceeding. In re Clisdell (D. C.) 4 Am. Bankr. Rep. 95, 101 Fed. 246; In re Mason, 3 Am. Bankr. Rep. 599, 99 Fed. 256. §§ 14 and 29 state the objections which may be interposed and litigated here. Jurisdiction and the validity of the prior proceedings are not included. The confusion in the cases has arisen over the attempt to show that an infant who actually "owes" a debt for which he and his property are liable, and which may be enforced against both, is not entitled to the benefits of the act, for the reason that infants who have made contracts not binding, and which may not ever become binding, which the infant may ratify on be-

coming of age and then owe the debt incurred by such ratification, but which they do not owe or cannot owe during infancy, are not entitled to the benefits of the act; in other words, that infants who do "owe" debts are not entitled to the benefits of the act, for the reason infants who do not owe debts are not.

Infants with no liabilities except of the latter description are not entitled to the benefits of the act, for the reason they do not "owe" debts, not for the reason they are infants. An adult is not entitled to the benefits of the act unless he owes debts. The disability of the infant goes to his power to incur a debt, so that he cannot be said to owe it, not to his power to pay or avoid a debt he actually owes, or take the benefit of a law which releases him, or which may release him, from one he actually "owes." The law does not say "any adult person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt," but "any person;" and until it can be demonstrated that an infant who owes a debt is not a "person," such infant is within the law and entitled to its benefits. Such infant is clearly included in the term "any person who owes debts," etc. It would have been just as easy for Congress to have said "Adult persons who owe debts," or "Any adult person who owes debts," and thus have excluded infants who owe debts, as to have used the language it did. It was not the purpose of Congress to secure an equal distribution of the property of all insolvent adult persons amongst their creditors, respectively, and give them the benefits of the act, and leave the property of infants within the grasp of the first creditor obtaining judgment, to the exclusion of all others, and leave such infant liable for its unpaid debts or for the remainder of its unpaid debts. There is no reason why infants who owe debts which may be enforced against them and their property should not have the benefit of the act, and I can see no legal obstacle to their having it.

By the adjudication it was settled that Walrath, the petitioner, owed debts, and in that adjudication this objecting creditor acquiesced. He made himself a party to the proceedings in bankruptcy, when he appeared therein, and proved his claim, and examined the bankrupt, and took part in the appointment of the trustee of his estate. He comes here in this proceeding, alleging that he is a creditor of this infant, and, in legal effect, asserts that the petitioner owes to him an established and enforceable debt. On his own showing this infant is within and

entitled to the benefits of the law. He sets up no objection specified as a ground for refusing a discharge in §§ 14 and 29 of the act, and as the adjudication stands unreversed it must be assumed to be valid. As was said by Coxe, Circuit Judge, In re Clisdell, *supra:*

"The petition for a discharge rests upon the fundamental proposition that the petitioner has been adjudicated a bankrupt."

This court holds that the validity of that adjudication, not appealed from, reversed, or set aside, cannot be questioned, on application for a discharge, except by showing it was made by a court having no jurisdiction to pronounce it.

Motion granted, and there will be a discharge according to the prayer of the petition.[9]

b. Married Women

MAC DONALD v. TEFFT-WELLER CO. et al.

128 Fed. 381, 63 C. C. A. 123

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904)

Involuntary proceedings in bankruptcy were begun in the District Court by the filing of a petition alleging, *inter alia,* that "Ruth E. MacDonald is a married woman * * * and has for several years * * * been engaged in the business of buying, selling, and trading in dry goods * * * and has conducted said business in her own name; * * * that the said business, and said goods, wares, and merchandise, store, and office fixtures and furniture and store accounts are her separate personal property, and that the amounts due by said Ruth E. MacDonald in the conduct of said business to petitioners, hereinafter referred to, were incurred by her for the purchase price of the personal property, to wit, stock of goods in the store and business of said Ruth E. MacDonald, and went to the increase of her separate personal property, and that she therefore charged her separate property with the payment of the same;" that the petitioners have provable claims against the alleged bankrupt for specified amounts, and that the alleged

9—*Acc.* In re Brice, 93 Fed. 942. But see In re Eidemiller, 105 Fed. 595; In re Soltykoff. [1891] 1 Q. B. 413. As to firms in which infants are partners, see In re Dunnigan, 95 Fed. 428, In re Duguid, 100 Fed. 274 and Jennings v. Stannus & Son, 191 Fed. 347, 112 C. C. A. 191.

bankrupt had, within four months, made a conveyance which was a preference of one of her creditors.

Mrs. MacDonald appeared by counsel, and filed demurrer to the foregoing petition on the following grounds: * * *

"(5) That a married woman residing in Florida cannot be adjudged a bankrupt; (6) that there is no personal liability for her obligations resting upon a married woman residing and doing business within the state of Florida, which obligations would be enforceable against her, and that a married woman cannot be adjudicated a bankrupt; (7) that in this court a married woman not a free dealer cannot be adjudicated a bankrupt."

The court below overruled the demurrer, and this court is asked to revise the proceedings on the grounds stated in the demurrer.

PARDEE, Circuit Judge (after stating the facts * * *). The question presented is whether, under the facts alleged in the petition in this case, a married woman in the state of Florida, having separate statutory property, and engaging in trade, buying, and selling on her own account, but not a free dealer, can be adjudicated a bankrupt under the bankrupt law of 1898.

Under §§ 1505-1509, Rev. St. Fla. 1892, a married woman may have her disabilities removed, and she may have a license as a free dealer authorized to contract, sue, and be sued, and in all respects to bind herself as if she were unmarried. See Martinez v. Ward, 19 Fla. 175.

By article XI of the Constitution of the state of Florida of 1885 it is provided:

"§ 1. All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterwards by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women.

"§ 2. A married woman's separate real or personal property may be charged in equity and sold, or the uses, rents and profits thereof sequestrated for the purchase money thereof; or for money or thing due upon any agreement made by her in writing for the benefit of her separate property; or for the price of any property purchased by her, or for labor and material used

with her knowledge or assent in the construction of buildings, or repairs, or improvements upon her property, or for agricultural or other labor bestowed thereon, with her knowledge and consent.

"§ 3. The Legislature shall enact such laws as shall be necessary to carry into effect this article."

It does not appear that there has been any legislation under § 3 of said article, but "it is well settled," says the Florida Supreme Court in First National Bank of Pensacola v. Hirschkowitz, 35 South. 22:

"In an unbroken line of decisions, beginning with Lewis v. Yale, 4 Fla. 418, down to the present time, this court has held that 'a feme covert is not competent to enter into contracts so as to give a personal remedy against her.' As was said in Dollner v. Snow, 16 Fla. 86: 'At common law the promissory note of a married woman is void. The Constitution and statute of this state make no change in this respect. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her.' Under the rule laid down in these decisions, appellants could not have proceeded at law against the said married woman, Dora Hirschkowitz, and hence could not have reduced their claims to judgment; also see Crawford v. Feder, 34 Fla. 397, 16 South. 287."

In the headnotes to this report, which in Florida are prepared by the judges, No. 1 reads as follows:

"At common law the promissory note of a married woman is void. The Constitution and statutes of this state make no change in this respect, unless said married woman shall have been made a free dealer. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her."

The court further says:

"It is also the settled law of this state that 'where a married woman carries on business in her own name, having property employed in such business, and purchases goods upon her sole credit for the purpose of such business, her separate property may be subjected in equity to the payment of claims for money due for such purchases.' Blumer v. Pollak, 18 Fla. 707. Also see Staley v. Hamilton, 19 Fla. 275; Garvin v. Watkins, 29 Fla. 151, 10 South. 818; Halle v. Einstein, 34 Fla. 589, 16 South. 554. In Crawford v. Gamble, 22 Fla. 487, it was held that 'merchandise purchased by a married woman who is conduct-

ing a mercantile business in her own name is her separate statutory property.' "

From these references to the law in Florida it appears that a married woman having separate statutory property, although not a free dealer, can lawfully carry on business, buy and sell upon her sole credit, and thus contract obligations binding upon her property in all respects as if she were a feme sole, except that she cannot be held personally liable at law; the creditors' legal remedy upon her contracts being in equity, under which all her separate property may be taken. That is to say, that such married woman may contract a debt which she morally owes—owes in equity and good conscience, lawfully owes—but which she cannot be personally adjudged to pay.

Is the limited obligation thus resulting a "debt," within the meaning of the word as used in § 4 of the bankrupt law of 1898? Clause "a," § 4, Bankr. Law, July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." Clause "b" provides that "any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default, or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act." Blackstone defines a "debt" as follows: "A sum of money due by certain and express agreement, as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it." 3 Bl. Com. 154. Again: "Any contract, in short, whereby a determinate sum of money becomes due to any person and is not paid, but remains in action merely, is a contract of debt." 2 Bl. Com. 464. "The word 'debt' is of large import, including not only debts of record or judgments and debts by specialty, but also obligations arising under simple contract to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise." Gray v. Bennett, 3 Metc. (Mass.) 522, 526; Shane v. Francis, 30 Ind. 93. "A 'debt' signifies whatever one owes. There is always some obligation that it shall be

paid, but the manner in which, or the condition upon which, it is to be paid, or the means of recovering payment, do not enter into the definition." Rodman v. Munson, 13 Barb. 197. "A debt is a sum of money due by contract, express or implied." Perry v. Washburn, 20 Cal. 350. § 1 of the bankrupt law of July 1, 1898, c. 541, which gives the meaning of words and phrases used in the act, provides in paragraph 11 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), "'debt' shall include any debt, demand or claim provable in bankruptcy," and § 63 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]), relating to debts which may be proved, provides as follows: "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account or upon a contract express or implied."

These broad definitions of "debt" from the text-books, adjudicated cases, and the bankrupt law all clearly include the obligation lawfully contracted by a married woman, not a free dealer, in the state of Florida, dealing with her separate estate.

We are referred to no adjudicated cases on the question as to whether a married woman can be adjudicated a bankrupt under the present law—all the cases cited are under other and former laws.

The English cases cited, and much relied on by counsel for petitioner (Ex parte Jones, In re Grissel, 12 Chan. Div. 484, and In re Gardiner, Ex parte Coulson, 20 Q. B. Div. 249), lose much of their force here, because the married women's property act, 45 & 46 Vict., provides: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." And § 152 of the bankruptcy act provides: "Nothing in this act shall affect the provisions of the married women's property act 1882."

In re Kinkead, 3 Biss. 405, Fed. Cas. No. 7,824, a case decided under the law of 1867, wherein it was held that a married woman residing in Illinois could be adjudicated a bankrupt, seems to have turned upon the laws of Illinois with regard to the rights of married women. In the note by the learned reporter in that case many of the current decisions in this country and in England are reviewed, and the reporter sums up as follows:

"Impossible as it may be to reconcile the decisions on the general question of the rights and liabilities of married women,

the duty of the federal courts in administering the bankrupt act would seem to be simply to determine the status of a married woman under the existing laws of the state where the jurisprudence is to be exercised, and administer the act upon the basis of the principles thus discovered. The foundation of bankruptcy proceedings is indebtedness; but the bankrupt act does not make any new standard of liability—it simply operates upon those already existing. The application of the act to married women depends, clearly, not upon their rights, but their liabilities, and those liabilities are determined by the law of the forum where the jurisdiction is invoked."

From what has been said, it follows that we do not agree with the learned counsel, whose able oral argument and exhaustive brief have received our close attention, that the test is whether the contracts of an alleged bankrupt can be enforced by judgment in personam, but rather is whether the said contracts constitute an existing indebtedness.

The object of the bankrupt law is twofold—the benefit of the creditors and the relief of the bankrupt. Mr. Justice Story describes a bankrupt law as "a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts." 2 Story, Const. § 1113, note 2. Mr. Stephen speaks of it as "a system of law of a peculiar and anomalous character, intended to afford to the creditors of persons engaged in trade a greater security for the collection of their debts than they enjoyed at common law under the ordinary remedy by action." 2 Steph. Com. 189. It cannot be necessary that both objects shall be attainable in order to warrant proceedings in bankruptcy. In many, perhaps a majority, of cases, the relief to the bankrupt is the only question, for there are no assets to distribute, and in many other cases the benefit and relief of creditors is the only object. A bankrupt may through fraud have lost his right to a discharge. An insolvent corporation whose property, including all franchises, has been distributed to creditors in involuntary proceedings in bankruptcy, takes little, if anything, by a discharge.

But this can be said for the petitioner that, if she is discharged in bankruptcy, and thereafter she is sued at law or in equity, she can plead the discharge in bankruptcy as well as coverture, and with regard to after-acquired separate property she will be relieved from all her present obligations. The legal as well as the general trend of the day is towards emancipating

women, married or single, from all legal and other disabilities not bearing on the other sex, and particularly in all directions wherein she is thought to be handicapped in earning a living, taking care of her property, or carrying on business. And if a married woman is encouraged and permitted to carry on business, buy and sell—in short, be a trader, as she is in Florida—why, when she is unfortunate in business and burdened with debts, shall she not, like the married man, be entitled to claim and have her debts wiped from the slate under the more or less wise provisions of the bankrupt law?

On the whole matter, we conclude that neither the terms nor the policy of the bankrupt law of 1898, nor any outside public policy, preclude, because of coverture, a woman owning debts exigible against her property from being adjudicated a bankrupt; and it follows that the question stated at the beginning of this opinion must be answered in the affirmative, and that this petition for revision be denied.

And it is so ordered.[10]

c. Lunatics

In re FUNK

101 Fed. 244

(District Court, N. D. Iowa. April 26, 1900)

SHIRAS, District Judge. From the papers submitted to the court it appears that on the 4th day of October, 1899, Jacob A. Funk, then residing in Livingston county, Ill., was duly adjudged to be insane by the county court of the named county, and F. L. Rieke was appointed the guardian of his person and estate, and qualified as such guardian; and on the 12th day of March, 1900, a duly-certified copy of the record of such proceedings was filed in the office of the clerk of the district court in Wright county, Iowa; and thereupon, by order of that court, the said Rieke was appointed guardian of the property of said Funk in the state of Iowa,—it appearing that he then had a stock of goods in Wright county in charge of an agent or clerk. It further appears that on the 13th day of April, 1900, a petition on behalf of certain creditors was filed in this court, aver-

10—See also In re Johnson, 149 Fed. 864.

ring that Jacob A. Funk was insolvent, and had committed certain acts of bankruptcy in the months of March and April, 1900, by transferring property to secure debts due to certain named creditors. To this petition an answer has been filed by the guardian of the alleged bankrupt, in which is set forth the adjudication of the court in Illinois, declaring Funk to be insane, and the appointment of the guardian in Illinois, and also in Iowa, and then, by proper averment, the answer presents the question whether Funk can be adjudged a bankrupt for acts done by him after the date of the adjudication of insanity, and the appointment of a guardian for his person and property. By § 8 of the bankrupt act, it is declared that "the death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane." In this section provision is made for cases wherein the proceedings in bankruptcy are commenced during the lifetime of the party, or at a time preceding his becoming insane, and, in effect, the meaning of the section is that, in cases wherein the jurisdiction of the court in bankruptcy has rightfully attached, the proceedings shall not be abated by the subsequent death or insanity of the bankrupt. In cases wherein the party, although giving evidence of insanity, has not been adjudged insane, but remains in possession and control of his property, and his creditors seek his adjudication as a bankrupt, it might be held that the bankruptcy court could rightfully exercise jurisdiction, and could hold the party responsible for his acts done before the fact of his insanity had been ascertained and established; but, however this may be, it cannot be so held in cases like that now before the court, wherein it appears that, prior to the filing of the petition in bankruptcy on behalf of creditors, the party proceeded against had been adjudged to be insane by a competent court, and a guardian had been put in possession of his property. By § 3227 of the Code of Iowa, it is provided that, if the estate of an insane person "is insolvent, or will probably be insolvent, the same shall be settled by the guardian in like manner and like proceedings may be had, as are required by law for the settlement of the insolvent estate of a deceased person." Under the provisions of this section, it becomes the duty of the guardian appointed by the district court of Wright county to settle up the estate placed in his hands under the direction of the court appointing him, and it will be the duty of that court

to determine the question of the validity of the liens or conveyances executed since the date of the adjudication of the insanity of the alleged bankrupt, and to make due and proper distribution of the assets belonging to the estate now in its charge. It certainly cannot be held that the present bankrupt act confers upon the courts of bankruptcy the right to settle the estates of insolvent decedents unless jurisdiction in the court of bankruptcy had attached during the lifetime of the bankrupt, and the same rule must hold good in cases wherein, before the petition has been filed in the bankrupt court, the debtor has been adjudged to be insane, and his property has been taken charge of by a state court of competent jurisdiction.

It is further contended by the guardian in this case that the acts of bankruptcy charged in the petition were committed after Funk had been adjudged to be insane, and that he cannot be held responsible therefor in such sense that these acts can be held to be acts of bankruptcy; and in support of this contention the ruling of Judge Dillon in the case of In re Marvin, 1 Dill. 178, Fed. Cas. No. 9,178, is cited, wherein it was said that "the court is of opinion that a person who is so unsound in mind as to be wholly incapable of managing his affairs cannot in that condition commit an act for which he can be forced into bankruptcy by his creditors, against the objection of his guardian;" and it would seem clear that a person who, by reason of insanity, is wholly incapable of managing his business affairs, cannot be held to have intended to violate the provisions of the bankrupt act by entering into transactions which, by reason of his mental disability, would not be binding upon him under the rules of the common law. Under the admitted facts in this case, this court, as a court of bankruptcy, should not entertain jurisdiction of the petition filed by the creditors, and the same will therefore be dismissed, at the costs of petitioners.

In re WARD

161 Fed. 755

(District Court, D. New Jersey. April 10, 1908)

LANNING, District Judge. Three creditors of William R. Ward have filed their petition to have him adjudged an involuntary bankrupt. The only act of bankruptcy charged is that:

"William R. Ward is insolvent, and that within four months

preceding the date of this petition the said William R. Ward committed an act of bankruptcy, in that he did heretofore, while insolvent, and on the 27th day of November, 1907, and the 5th day of December, 1907, convey to one Benjamin Treacy, of the city of Jersey City, county of Hudson, and state of New Jersey, 11 distinct and separate parcels of land, with the buildings thereon, situated in the cities of Newark and East Orange, county of Essex, and state of New Jersey, including the place of residence of said William R. Ward, with intent to hinder, delay, and defraud the creditors of said William R. Ward, including your petitioners."

An answer was promptly filed by Ward's guardian ad litem, appointed on ex parte proofs of his insanity, setting up, as defenses: (1) That Ward, at the time of committing the alleged act of bankruptcy mentioned in the petition, was so unsound of mind as to be wholly incapable of managing his affairs or of committing the act of bankruptcy charged; (2) that he did not commit the act of bankruptcy charged; and (3) that he is not insolvent. Later, another answer was filed, under an order of leave granted by the court, by Anna Day Ward and Henry L. Poinier, as guardians of the person and estate of Ward, setting up that on December 28, 1907, which was 10 days after the petition in bankruptcy was filed, proceedings under a writ de lunatico inquirendo were instituted against Ward in the Court of Chancery of New Jersey, which resulted in a decree of that court, dated March 2, 1908, confirming the proceedings and the finding of the jury "that the said William R. Ward of East Orange, N. J., was, at the time of taking that inquisition a lunatic of unsound mind and did not enjoy lucid intervals, so that he was not sufficient or capable of the government of himself, his lands, tenements, goods, and chattels, and that he had been in the same state of lunacy and unsoundness of mind from at least the 1st day of May, 1904," and that on March 28, 1908, the orphans' court of Essex county duly appointed Anna Day Ward and Henry L. Poinier as guardians of Ward's person and estate. In this answer there are also set up the same defenses made by the answer of the guardian ad litem. In each of the answers there is a demand that the issues be tried by a jury.

The motions are to strike out the defense of insanity, to limit the issues to be tried by the jury to the second and third defenses, and, if these motions be denied, for an order for the examination of Ward by the petitioning creditors and their ex-

perts before trial. The first of these motions is based on the theory that the insanity of an alleged bankrupt is not a good defense, where no adjudication of lunacy has been made prior to the filing of the petition in bankruptcy.

The federal Constitution confers upon Congress the power to establish "uniform laws on the subject of bankruptcies, throughout the United States." The extent to which Congress has exercised that power determines the scope of the power of the federal courts in bankruptcy cases. § 8 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425]) is as follows:

"The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane; provided that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence."

This section clearly provides that, if the jurisdiction of the bankruptcy court in a given case has once rightfully attached, it cannot be defeated by the subsequent death of the alleged bankrupt, or if he subsequently become insane. Whether jurisdiction exists to administer the estate of an insolvent debtor in bankruptcy, where the alleged bankrupt has been adjudged, after the petition in bankruptcy has been filed, to have been, from a time antedating the alleged act of bankruptcy, a lunatic wholly incapable of managing himself or his estate, must be determined by comparing other provisions of the bankruptcy act with § 8. The creditors in the present case contend that jurisdiction attaches in the present case because § 4b (30 Stat. 547) declares that "any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil," may be adjudged an involuntary bankrupt. But no natural person can be so adjudged, in an involuntary proceeding, unless he committed one of the acts of bankruptcy described in § 3a (30 Stat. 546) within four months next before the filing of the petition in bankruptcy. The first subdivision of that section declares that any person shall be held to have committed an act of bankruptcy if he has "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property, with intent to hinder, delay or defraud his creditors, or any of them." That is the act of bankruptcy charged against Ward. But if he has been a lunatic and

so unsound of mind as to have been wholly incapable of managing himself or his estate ever since May 1, 1904, he could not have conveyed his lands in November and December, 1907, "with intent to hinder, delay and defraud his creditors." "An intent to hinder or delay creditors," says Judge Bradford, in the Wilmington Hosiery Company's Case (D. C.) 120 Fed. 185, "involves a purpose wrongfully and unjustifiably to prevent, obstruct, embarrass, or postpone them (creditors) in the collection or enforcement of their claims." Without undertaking to determine the exact boundaries of the jurisdiction of our bankruptcy courts in cases against lunatic bankrupts, it is sufficient to say that, in the present case, the defense of insanity cannot be stricken out of the answer.

But is the adjudication in the Court of Chancery of New Jersey conclusive on this court in this proceeding? It would not be so in an action at law against the alleged bankrupt. In such a case, "when an inquisition is admitted in evidence, the party against whom it is used may introduce proof that the alleged lunatic was of sound mind at any period of the time covered by the inquisition." Den v. Clark, 10 N. J. Law, 217, 18 Am. Dec. 417. The same rule applies in equity. Hunt v. Hunt, 13 N. J. Eq. 161; Yauger v. Skinner, 14 N. J. Eq. 389; Hill's Ex'rs v. Day, 34 N. J. Eq. 150; 16 Am. & Eng. Ency. Law, 606. I think it is equally applicable to a bankruptcy case where the adjudication of lunacy is made upon proceedings instituted after the petition in bankruptcy has been filed. The Funk Case (D. C.) 101 Fed. 244, is distinguishable from this because there the adjudication of lunacy was made, and the property of the lunatic put into possession of his guardian, before the petition in bankruptcy was filed. In the Kehler Case (D. C.) 153 Fed. 235, where a petition in involuntary proceedings was filed before the alleged bankrupt had been adjudged a lunatic, Judge Hazel denied the motion to dismiss the petition because the jurisdiction of the bankruptcy court attached before the alleged bankrupt was adjudged insane, and because of the presumption of the alleged bankrupt's sanity at the time the acts of bankruptcy were committed. It is not necessary to decide, in the present case, what may be the effect of an adjudication of lunacy and the appointment of a guardian or committee for the lunatic under a writ de lunatico inquirendo before a petition in bankruptcy is filed against the lunatic. It may be that in such a case the bankruptcy court acquires no

jurisdiction; but, where a person is adjudged a lunatic under proceedings instituted after a petition in bankruptcy has been filed against him, the jurisdiction of the bankruptcy court to try the issues involved in the bankruptcy proceedings seems to me clear. In such a case, its jurisdiction attaches upon the filing of the petition in bankruptcy. If the alleged bankrupt was, at the time of committing the alleged act of bankruptcy charged in the petition filed against him, so insane that he did not understand the nature of the act, its commission should be denied on the ground that, being insane, he could not commit it. On the trial of such an issue, the adjudication of lunacy may, perhaps, be offered as prima facie evidence of insanity, provided it shows lunacy at the time of the commission of the alleged act of bankruptcy.

It will be observed, from what has been said, that, in such a case as the present one, the defense that the alleged bankrupt did not commit the act of bankruptcy charged against him involves the question of his insanity. As already stated, the only act of bankruptcy charged here is that the alleged bankrupt conveyed certain of his lands with intent to hinder, delay, or defraud his creditors. Evil intent is an essential element of the act charged. § 19 (30 Stat. 551) of the bankruptcy act gives to an alleged bankrupt the right to a trial by jury of the question of his insolvency and of the question concerning his commission of an act of bankruptcy, provided a written application for such trial be made. Such application has been made. The question of the alleged bankrupt's insanity will therefore be submitted to the jury as an essential part of the defense that he did not commit the act of bankruptcy charged.

Although it is alleged in the petition that Ward was insolvent at the time of executing the deeds of conveyance, that allegation is immaterial, and will not be involved in the issues to be tried. There is also an allegation that he was insolvent at the time of the filing of the petition. That is a proper, if not a necessary, allegation, since § 3c of the bankruptcy act makes the defense of solvency at the time of filing the petition, in a case like the present one, a good defense. West Company v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. ed. 1098; Elliott v. Toeppner, 187 U. S. 330, 23 Sup. Ct. 133, 47 L. ed. 200.

The issues to be tried by the jury are therefore: (1) Whether the alleged bankrupt was insolvent at the time of the filing of the petition in bankruptcy, and (2) whether the particular act

of bankruptcy charged was committed by him. The latter issue will necessarily involve the question of his insanity. * * *

[The third motion of petitioners was also denied.]

The motions of the petitioning creditors will all be denied. They may file their replication and bring the case to trial in the usual source of procedure.[11]

3. PARTNERSHIPS

STANLEY FRANCIS v. J. HECTOR McNEAL

228 U. S. 695, 57 L. ed. 1029, 33 Sup. Ct. 701

(United States Supreme Court. May 26, 1913)

Mr. Justice HOLMES delivered the opinion of the court:

This is a proceeding to review an order of the bankruptcy court to the effect that the separate estate of Stanley Francis should be turned over for administration to the respondent, McNeal, trustee in bankruptcy of a firm of which Francis was a member. The order was made on the petition of the trustee, and was affirmed upon a petition for revision by the Circuit Court of Appeals. 108 C. C. A. 459, 186 Fed. 481.

The facts are short. Creditors filed a petition against Latimer, Francis, and Marrin, alleging that they were partners trading as the Provident Investment Bureau, and that they were bankrupt individually and as a firm. McNeal was appointed receiver of the partnership and individual estates, but Francis denied that he was a partner, and sought to have the receiver discharged. Thereupon, on March 13, 1906, it was agreed between the counsel for the receiver and for Francis that McNeal should be discharged as receiver of the individual estate of Francis; that the question whether Francis was a partner should be referred to one of the regular referees; that until the determination of that question, his counsel, Scott, should collect the rents and retain possession of his estate; and that thereafter Scott should account and turn over the funds to such person as the court might direct. On April 17 an order was made embodying the agreement and naming a referee. The referee found that Francis was a partner, and that now stands admitted for the purposes of the present decision. The firm was adjudicated bankrupt in June, 1909. McNeal was appointed trustee in July, and forthwith filed the

11—*Cf.* In re Eisenberg, 117 Fed. 786. As to insanity of a partner see In re Stein, 127 Fed. 547, 62 C. C. A. 272.

petition upon which the order in question was made. The order declared that the separate estate of Francis was subject to administration in bankruptcy, and ordered the real estate turned over to McNeal, with leave to sell. The firm, even with the separate estates of the partners, will not be able to pay its debts in full.

Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by § 1, the word "person," as used in the act, includes partnerships; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by § 5a, a partnership may be adjudged a bankrupt, and that by § 14a, any person may file an application for discharge. No doubt these causes, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. § 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from § 5,

clauses c through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, "in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt." [30 Stat. at L. 548, c. 541, U. S. Comp. Stat. 1901, p. 3424.]

In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. § 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within § 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no such objection has been taken, but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion

of the majority in Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct.

Decree affirmed.[12]

4. CORPORATIONS

Note: Before the amendment of 1910 a corporation was not entitled to become a voluntary bankrupt, and only certain classes of corporations were liable to involuntary bankruptcy, their liability depending on whether they were "engaged principally in manufacturing, trading, printing, publishing, ('mining' was added by the amendment of 1903) or mercantile pursuits." Many interesting distinctions were made in determining whether corporations were within the liable classes, but they are, of course, not of great importance under the law as it now stands, which has returned to the phraseology of § 37 of the Act of 1867: "moneyed, business, or commercial corporations." The decisions under that Act, which have been held to be authoritative as to the interpretation of the 1910 amendment (In re R.

12—Before the decision in Francis v. McNeal the courts were hopelessly divided on several questions arising out of the provisions of § 5 of the Act. It was pretty well agreed that § 5 (a) justified the treatment of the firm itself as a distinct entity apart from any or all of the partners, and that this entity was adjudicable as a bankrupt whether the partners were adjudicated or not. Chemical Nat. Bk. v. Meyer, 92 Fed. 896; In re Perlhefter, 177 Fed. 299. But on the question of insolvency it was uncertain whether the solvency of the firm should be determined by balancing firm liabilities against firm assets (In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61; In re Everybody's Market, 173 Fed. 492) or whether the individual assets of the several partners should also be included (In re Blair, 99 Fed. 76; Vaccaro v. Bank, 103 Fed. 436, 43 C. C. A. 279; Francis v. McNeal, 186 Fed. 481, 108 C. C. A. 459); the weight of authority doubtless inclining to the latter view. And on the question as to whether the trustee in bankruptcy of the bankrupt firm should administer both the firm estate and the estates of the non-bankrupt partners the courts also divided; one line of cases (of which Francis v. McNeal, 186 Fed. 481, 108 C. C. A. 459; Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261; and In re Duke & Sons, 199 Fed. 199, are representative) held that the firm trustee had this power, and that § 5 (h) referred only to cases in which some of the partners, but not the firm itself, were bankrupt; other cases (In re Junck & Balthazard, 169 Fed. 481; In re Solomon & Carvel, 163 Fed. 140) following the doctrine of the Bertenshaw case, held that the firm trustee had no such power, and that § 5 (h) was intended to govern the case of a firm which had been adjudicated. See note in 10 MICH. LAW REV. 215.

L. Radke Co., 193 Fed. 735), held generally that these words included practically every corporation organized for pecuniary profit. See Adams v. Boston, etc., R. R. Co., Holmes 30, 1 Fed. Cas. No. 47; Sweatt v. id., 3 Cliff. 379, 23 Fed. Cas. No. 13684; Rankin v. Florida, etc., R. R. Co., 20 Fed. Cas. No. 11567; Winter v. Iowa, etc., Ry. Co., 2 Dill. 487, 30 Fed. Cas. No. 17890; In re Independent Ins. Co., Holmes 103, 13 Fed. Cas. No. 7017; In re Merchants Ins. Co., 3 Biss. 162, 17 Fed. Cas. No. 9441; In re Hercules, etc., Soc., 6 Benedict 38, 12 Fed. Cas. No. 6402.

CHAPTER II

PREREQUISITES TO ADJUDICATION

SECTION I

IN VOLUNTARY PROCEEDINGS

In re SCHWANINGER

144 Fed. 555

(District Court, E. D. Wisconsin. March 2, 1906)

QUARLES, District Judge. This is a motion to discharge a voluntary petition in bankruptcy, and to set aside the adjudication made thereon. The schedules of the bankrupt show but one debt, which is a judgment for $1,065.80. The schedule of assets discloses that the entire property of the bankrupt consists of chattels amounting in value to $50, all of which is claimed as exempt, and undoubtedly is exempt under the statutes of Wisconsin.

The question raised by the motion is a novel one. The sole creditor appears and raises the contention that a debtor having but one debt and no assets to which the trustee can take title under the act, is not a person qualified to become a bankrupt under the provisions of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], and that the court has acquired no jurisdiction over the case. As jurisdiction in bankruptcy springs wholly from the statute, the pending question must hinge upon the construction of the provisions of the act of Congress. § 4 (30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), provides that "Any person who has [owes] debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." It is contended that this language clearly indicates the purpose of Congress to extend the benefits of the act only to such debtors as have a plurality of debts; that the language is so plain there is no room for construction. But § 1, subd. 29, under the title "Definitions," provides that "words importing the plural number may be applied to and mean only

a single person or thing." This provision, if applicable, would make the text of § 4 read "debts or debt," and would seem to settle the question adversely to the present motion. No doubt has been expressed so far as we can find, in any text-book or adjudicated case, that § 4 ought to be construed with reference to the definition provided in § 1.

Re Maples (D. C.) 105 Fed. 922, is a case where there was but a single debt, and where there were no assets. If the objection which we are now considering were sound, it was clearly decisive of the Maples Case. But the court was at great pains to point out that the solitary debt in that case was not a provable debt within the purview of the bankruptcy act. The court there held "the bankrupt in his petition, therefore, has not presented any debt or claim from which this court can discharge him." While the court did not expressly say that a single provable debt would answer the purposes of jurisdiction, we are left to infer as much from what the court did say. Re Yates (D. C.) 114 Fed. 365, is another case where the only debt disclosed by the schedules was a judgment in tort, wherein an appeal had been taken which suspended its mandate for the time being. There is no suggestion in the opinion that the judgment, if final, and of a nature to be proved as a debt, would not sustain the jurisdiction. The reasoning of the court would certainly lead us to the opposite conclusion. I pass now to consider the second proposition upon which this motion is based.

It is contended that where there is no property to be distributed there is no function to be performed by any officer known to the act, and that the machinery provided by the law will be wholly inoperative, and that such a proceeding, culminating only in the discharge from a single obligation, was not within the contemplation of Congress. While it is true that the act of 1898 contemplates distribution as well as discharge, the presence of assets has not been specifically recognized and laid down as essential to jurisdiction, while the existence of indebtedness has been explicitly made a condition precedent. Cases are cited holding that the absence of assets is fatal to the jurisdiction of probate courts. Such cases are not in point here, because the distribution of assets among creditors and legatees or heirs at law, is the sole function of a court of probate. When the bankruptcy act was passed, Congress had in mind the relief of unfortunate debtors. That humane policy permeates the entire

act, and seems to have been made quite as important a function as an equitable distribution of assets among the creditors. The bankruptcy act of 1841 was the first act which provided for an unqualified discharge of the debtor. Its constitutionality was assailed, and the court, in Re Klien, 1 How. (42 U. S.) 277, note, Fed. Cas. No. 7,865 say:

"Of this subject Congress has general jurisdiction; and the true inquiry is, to what limits is that jurisdiction restricted? I hold it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress."

In Hanover National Bank v. Moyses, 186 U. S. 181, 188, 22 Sup. Ct. 857, 46 L. ed. 1113, which involved the constitutionality of the act of 1898, the court say:

"The subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the states were forbidden to do."

Later on, on page 192 of 186 U. S., page 862 of 22 Sup. Ct. (46 L. ed. 1113), the court say:

"The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicil."

It is difficult to understand why a debtor owing a single obligation of $1,065, should not fall within the merciful policy of the act. It is an accidental circumstance that the indebtedness was not distributed among two or more creditors. His case is clearly within the spirit of the act, and no good reason has been suggested why he should not be within its scope and operation. It is my belief that Congress had not in mind any purpose to discriminate against an unfortunate debtor who is oppressed by a single obligation, and that the will of Congress will be effectuated by making the definition above recited

applicable to § 4, and treating the term "debts" where it occurs in such section as the equivalent of "debt."

For these reasons the motion will be denied.[1]

SECTION II

IN INVOLUNTARY PROCEEDINGS

A. Insolvency

GEORGE M. WEST CO. v. LEA et al.

174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. 836

(United States Supreme Court. May 22, 1899)

Mr. Justice WHITE delivered the opinion of the court.

The facts stated in the certificate of the Circuit Court of Appeals are substantially as follows:

Lea Bros. & Co. and two other firms filed on December 18, 1898, a petition in the District Court of the United States for the Eastern district of Virginia, praying that an alleged debtor, the George M. West Company, a corporation located in Richmond, Va., be adjudicated a bankrupt, because of the fact that it had, on the date of the filing of the petition, executed a deed of general assignment, conveying all its property and assets to Joseph V. Bidgood, trustee. The George M. West Company pleaded, denying that at the time of the filing of said petition against it the corporation was insolvent, within the meaning of the bankrupt act, and averring that its property, at a fair valuation, was more than sufficient in amount to pay its debts. The prayer was that the petition be dismissed. The court rejected this plea, and adjudicated the West Company to be a bankrupt. The cause was referred to a referee in bankruptcy, and certain creditors secured in the deed of assignment, who had instituted proceedings in the law and equity court of the city of Richmond, under which that court had taken charge of the administration of the estate and trust under the deed of assignment, were enjoined from further prosecuting their proceedings in the state court under said deed of assignment. 91 Fed. 237. From this decree an appeal was allowed to the Circuit Court of

1—See also In re Lachenmaier, 203 Fed. 32, 121 C. C. A. 368. In re Jehu, 94 Fed. 638, it was held that creditors are not authorized by the Act to file answers to a voluntary petition in bankruptcy.

Appeals for the Fourth circuit. On the hearing of said appeal the court, desiring instructions, certified the case to this court. The certificate recites the facts as above stated, and submits the following question:

"Whether or not a plea that the party against whom the petition was filed 'was not insolvent, as defined in the bankrupt act, at the time of the filing of the petition against him,' is a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of his creditors."

The contentions of the parties are as follows: On behalf of the debtor it is argued that under the bankrupt act of 1898 two things must concur, to authorize an adjudication of involuntary bankruptcy. First, insolvency in fact, and, second, the commission of an act of bankruptcy. From this proposition the conclusion is deduced that a debtor against whom a proceeding in involuntary bankruptcy is commenced is entitled, entirely irrespective of the particular act of bankruptcy alleged to have been committed, to tender, as a complete bar to the action, an issue of fact as to the existence of actual insolvency at the time when the petition for adjudication in involuntary bankruptcy was filed. On the other hand, for the creditors it is argued that whilst solvency is a bar to proceedings in bankruptcy predicated upon certain acts done by a debtor, that as to other acts of bankruptcy, among which is included a general assignment for the benefit of creditors, solvency at the time of the filing of a petition for adjudication is not a bar, because the bankrupt act provides that such deed of general assignment shall, of itself alone, be adequate cause for an adjudication in involuntary bankruptcy, without reference to whether the debtor by whom the deed of general assignment was made was in fact solvent or insolvent.

A decision of these conflicting contentions involves a construction of § 3 of the act of 1898 (30 Stat. 546). * * *

It will be observed that the section is divided into several paragraphs, denominated as a, b, c, d, and e. Paragraph a is as follows:

"§ 3. Acts of Bankruptcy. (a) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent,

any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It is patent on the face of this paragraph that it is divided into five different headings, which are designated numerically from 1 to 5. Now, the acts of bankruptcy embraced in divisions numbered 2 and 3 clearly contemplate, not only the commission of the acts provided against, but also cause the insolvency of the debtor to be an essential concomitant. On the contrary, as to the acts embraced in enumerations 1, 4, and 5, there is no express requirement that the acts should have been committed while insolvent. Considering alone the text of paragraph a, it results that the nonexistence of insolvency at the time of the filing of a petition for adjudication in involuntary bankruptcy because of the acts enumerated in 1, 4, or 5 (which embrace the making of a deed of general assignment), does not constitute a defense to the petition, unless provision to that effect be elsewhere found in the statute. This last consideration we shall hereafter notice.

The result arising from considering the paragraph in question would not be different if it be granted *arguendo* that the text is ambiguous, for then the cardinal rule requiring that we look beneath the text for the purpose of ascertaining and enforcing the intent of the lawmaker would govern. Applying this rule to the enumerations contained in paragraph a, it follows that the making of a deed of general assignment, referred to in enumeration 4, constitutes in itself an act of bankruptcy, which *per se* authorizes an adjudication of involuntary bankruptcy entirely irrespective of insolvency. This is clearly demonstrated from considering the present law in the light afforded by previous legislation on the subject.

Under the English bankruptcy statutes (as well that of 1869 as those upon which our earlier acts were modeled), and our own bankruptcy statutes down to and including the act of 1867, the making of a deed of general assignment was

deemed to be repugnant to the policy of the bankruptcy laws, and, as a necessary consequence, constituted an act of bankruptcy, *per se*. This is shown by an examination of the decisions bearing upon the point, both English and American. In Globe Ins. Co. v. Cleveland Ins. Co., 14 N. B. R. 311, 10 Fed. Cas. 488, the subject was ably reviewed, and the authorities are there copiously collected. The decision in that case was expressly relied upon In re Beisenthal, 14 Blatchf. 146, Fed. Cas. No. 1,236, where it was held that a voluntary assignment, without preferences, valid under the laws of the state of New York, was void as against an assignee in bankruptcy; and this latter case was approvingly referred to in Reed v. McIntyre, 98 U. S. 513. So, also, in Boese v. King, 108 U. S. 379, 385, 2 Sup. Ct. 765, it was held, citing (p. 387, 108 U. S., and p. 771, 2 Sup. Ct.) Reed v. McIntyre, that whatever might be the effect of a deed of general assignment for the benefit of creditors, when considered apart from the bankrupt act, such a deed was repugnant to the object of a bankruptcy statute, and therefore was, in and of itself alone, an act of bankruptcy. The foregoing decisions related to deeds of general assignment made during the operation of the bankrupt act of 1867 (14 Stat. 536), or the amendments thereto of 1874 and 1876 (18 Stat. 180; 19 Stat. 102). Neither, however, the act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result of the clause in the act of 1867 forbidding assignments with "intent to delay, defraud or hinder" creditors, and from the provision avoiding certain acts done to delay, defeat, or hinder the execution of the act. Rev. St. 5021, pars. 4, 7. Now, when it is considered that the present law, although it only retained some of the provisions of the act of 1867, contains an express declaration that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubt as to the scope and intent of the law is removed. The conclusive result of a deed of general assignment under all our previous bankruptcy acts, as well as under the English bankrupt laws, and the significant import of the incorporation of the previous rule, by an express statement, in the present statute, have been lucidly expounded by Addison Brown, J., In re Gutwillig, 90 Fed. 475, 478.

But it is argued that, whatever may have been the rule in

previous bankruptcy statutes, the present act, in other than the particular provision just considered, manifests a clear intention to depart from the previous rule, and hence makes insolvency an essential prerequisite in every case. To maintain this proposition, reliance is placed upon paragraph c of § 3, which reads as follows:

"(c) It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt."

The argument is that the words "under the first subdivision of this section" refer to all the provisions of paragraph a, because that paragraph, as a whole, is the first part of the section, separately divided, and, although designated by the letter a, it is nevertheless to be considered, as a whole, as subdivision 1. But whether the words "first subdivision of this section," if considered intrinsically and apart from the context of the act, would be held to refer to paragraph a as an entirety, or only to the first subdivision of that paragraph, need not be considered. We are concerned only with the meaning of the words as used in the law we are interpreting. Now, the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph a. Thus, in the last sentence of paragraph c the matter intended to be referred to by the words "first subdivision of this section," used in the prior sentences, is additionally designated as follows, "and under said subdivision one," etc.,—language which cannot possibly be, in reason, construed as referring to the whole of paragraph a, but only to subdivision 1 thereof.

This is, besides, more abundantly shown by paragraph d, which provides as follows:

"(d) Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegations of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers and accounts and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure

to so attend and submit to examination the burden of proving his solvency shall rest upon him."

This manifestly only refers to enumerations 2 and 3 found in paragraph a, which, it will be remembered, make it essential that the acts of bankruptcy recited should have been committed by the debtor while insolvent. Indeed, if the contention advanced were followed, it would render § 3, in many respects, meaningless. Thus, if it were to be held that the words "first subdivision of this section," used in paragraph c, referred to the first division of the section (that is, to paragraph a as a whole), it would follow that the words "second and third subdivisions of this section," used in paragraph d, would relate to the second and third divisions of the section (that is, to paragraphs b and c). But there is nothing in these latter paragraphs to which the reference in paragraph d could possibly apply, and therefore, under the construction asserted, paragraph d would have no significance whatever. To adopt the reasoning referred to would compel to a further untenable conclusion. If the reference in paragraph c to the "first subdivision of this section" relates to paragraph a in its entirety, then all the provisions in paragraph a would be governed by the rule laid down in paragraph c. The rule, however, laid down in that paragraph, would be then in irreconcilable conflict with the provisions of paragraph d, and it would be impossible to construe the statute harmoniously without eliminating some of its provisions.

Despite the plain meaning of the statute as shown by the foregoing considerations, it is urged that the following provision contained in paragraph b of § 3 operates to render any and all acts of bankruptcy insufficient, as the basis for proceedings in involuntary bankruptcy, unless it be proven that at the time the petition was filed the alleged bankrupt was insolvent. The provision is as follows: "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act." Necessarily if this claim is sound, the burden in all cases would be upon the petitioning creditors to allege and prove such insolvency. The contention, however, is clearly rebutted by the terms of paragraph c, which provides as to one of the classes of acts of bankruptcy, enumerated in paragraph a, that the burden should be on the debtor to allege and prove his solvency. So, also, paragraph d, conforming in this respect to the requirements of paragraph a, contemplates an issue as

to the second and third classes of acts of bankruptcy, merely with respect to the insolvency of the debtor *at the time of the commission of the act of bankruptcy*. Further, a petition in a proceeding in involuntary bankruptcy is defined in § 1 of the act of 1898, enumeration 20, to mean "a paper filed * * * by creditors *alleging the commission of an act of bankruptcy* by a debtor therein named."

It follows that the mere statement in the statute, by way of recital, that a petition may be filed "against a person who is insolvent and who has committed an act of bankruptcy," was not designed to superadd a further requirement to those contained in paragraph a of § 3, as to what should constitute acts of bankruptcy. This reasoning also answers the argument based on the fact that the rules in bankruptcy promulgated by this court provide in general terms for an allegation of insolvency in the petition, and a denial of such allegation in the answer. These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant, because the particular act relied on in a given case conclusively imports a right to the adjudication in bankruptcy if the act be established, the allegation of insolvency in the petition becomes superfluous, or, if made, need not be traversed.

Our conclusion, then, is that as a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defense to a petition based upon the making of a deed of general assignment is not warranted by the bankruptcy law, and therefore that the question certified must be answered in the negative.

And it is so ordered.[2]

2—As to the necessity (before the 1910 amendment of § 4a) of an averment of insolvency in a voluntary petition, see In re Lachenmaier, 203 Fed. 32, 121 C. C. A. 368.

In re HINES

144 Fed. 142

(District Court, D. Oregon. February 5, 1906)

Several creditors of S. E. Hines, of North Bend, Coos county, Or., on January 25, 1905, filed their petition in court charging him with having committed an act of bankruptcy, in that, while insolvent, and on January 17, 1905, he suffered a judgment to be obtained against him in the sum of $2,030, upon which execution has been issued and certain property of defendant levied upon, and that defendant has not vacated or discharged the same. The defendant controverts these allegations, and avers that his property, at a fair valuation, is worth $3,000 in excess of his indebtedness or liabilities.

WOLVERTON, District Judge. The single question presented by counsel for the creditors for consideration is: Was the defendant insolvent when the judgment was entered against him and levy made in pursuance of the execution issued thereon? If he was, he is guilty of the act of bankruptcy charged; if not, the petition should be dismissed. In re Rome Planing Mill (D. C). 96 Fed. 812.

By the first section (subdivision 15) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]. See Collier on Bankruptcy [4th ed.] p. 2.) a person is deemed insolvent whenever the aggregate of his property, exclusive of any property that he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, is not, at a fair valuation, sufficient in amount to pay his debts. As it respects property considered in a commercial sense, I can conceive of no better or surer standard by which to arrive at a fair valuation than the market value; that is, what the property will probably bring, or is worth in the general market, where everybody buys. It could not be what it is worth to one person or to another specially circumstanced, or having special use for a particular article, but what it is worth as a marketable commodity, at a given time, with no special conditions prevailing other than affect the market generally in the locality where the commodity is for sale. "We think," says Mr. Justice Gray, in an able and elaborate opinion rendered in the Circuit Court

of Appeals for the Third Circuit, in the case of Duncan v. Landis, 106 Fed. 839, 858, 45 C. C. A. 666, 685, "that the present market value of the property in question would be a fair valuation of the same." See, also, In re Bloch, 109 Fed. 790, 48 C. C. A. 650, and In re Coddington (D. C.) 118 Fed. 281.

The intendment of the statute could scarcely be otherwise, giving the language employed its usual and natural significance. The difficulty is, and perhaps always will be, in arriving at the market value. Unless the commodity has a value quotable in the current markets of daily or frequent sales, there is much of opinion that enters into the estimate, and from this must be deduced the probable market value, and consequently, under the bankruptcy act, a fair valuation. Nor is such valuation affected by any depreciation of property consequent upon the recovery of judgment against the debtor and a levy thereunder. The language of the act is: "Having * * * suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," etc. (§ 3, subd. 3, Bankr. Act [30 Stat. 546; U. S. Comp. St. 1901, p. 3422]; Collier on Bankruptcy [4th ed.] p. 2, § 3, p. 27)—the intendment being that the insolvency must exist at the time of suffering the preference to be taken; for, if the debtor is solvent, it would be perfectly proper and legitimate for him to make any sort of preference that he might see fit. The fact of suffering the preference, therefore, unless it might be under circumstances indicating that he intended to hinder, delay, or defraud certain of his creditors, could not be permitted to affect the value of his assets. If such were the case, then a person, who was before perfectly solvent, might be rendered insolvent by an action, accompanied by an attachment, and his insolvency would depend upon whether he could pay his debts under the stress of the occasion, and not, under the simple inquiry prescribed by the bankruptcy act, whether the aggregate of his property, at a fair valuation, is sufficient in amount to pay his debts. Such is the rationale of the holding in Chicago Title & Trust Co. v. Roebling's Sons Co. (C. C.) 107 Fed. 71. That was an action by the trustee to recover on account of a preference alleged to have been obtained by a creditor attaching the manufacturing plant of the debtor, together with raw materials in store. The attachment destroyed the value of the plant as a going concern, and impaired also the value of the materials. It therefore became material to determine whether the valuation should be according to the

worth of the property prior or subsequent to such attachment, and the conclusion was that the prior worth was the appropriate standard by which to make the estimate; Kohlsaat, District Judge, saying:

"While I regret to be forced to the conclusion, yet I am of the opinion that, under the wording of the present bankruptcy act, and especially the proper interpretation of the words 'being insolvent,' such action on the part of a judgment creditor would not create a preference recoverable by the trustee under the terms of the act."

This decision, while not distinctly upon the point under discussion, is perfect in analogy, and its authority cannot be gainsaid. Nor should property exempt by the state law from execution be deducted from the debtor's assets in ascertaining whether they are, at a fair valuation, sufficient in amount to pay his debts. This has been directly decided in the case of In re Baumann (D. C.) 96 Fed. 946. The question came up on a construction of such subdivision 15, of § 1, of the bankruptcy act. Mr. Justice Hammond says, relative to the provision:

"This is probably as arbitrary a provision as is to be found in the statute. It was intended to wipe out, as with a sponge, all that confusion which is to be found in previous bankruptcy statutes and decisions as to the meaning of the word 'insolvency.' It had also the more comprehensive purpose of designating with absolute fixity the only class of persons upon whom the involuntary features of the bankruptcy statute should operate, namely, those whose property was not sufficient in amount to pay their debts. It does not proceed upon any theory that the debts will in fact be paid by the appropriation of the property to that end, nor upon the theory that as a matter of fact it is available for compulsory payment, but upon the theory that the defendant has sufficient property with which he may pay his debts if he chooses to do so. * * * Moreover the language of the above-quoted section is explicit. There is not the least ambiguity about its meaning. It leaves no room for any construction by implication or otherwise. Obviously, it was intended to give us a rule in mathematics, the terms of which are absolute."

So arguing, and in further consideration that the act has made one exception, and one only—that of property conveyed or concealed with intent to defraud—it was concluded that it was clearly not the intendment of Congress to make another

exception in relation to exempt property. The reasoning of the learned justice is strong and cogent, and his conclusion irresistible. The language of the act is very plain, without ambiguity or double meaning, and, when it is found that one exception is expressly made, it excludes, by almost absolute inference, a deduction that another was also intended, so that, upon a simple construction of the act, it is manifest that it was not the purpose or intendment of the lawgiver that exempt property should be deducted in ascertaining the amount of the debtor's property at a fair valuation.

In this view of the law, I will now examine the facts as disclosed by the evidence, to determine whether Hines was insolvent at the time the judgment was entered against him and levy made.

The property which Hines claims he owned consists of a stock of merchandise (the same that was levied upon); bills and accounts, and $350 in cash; lot 3, block 19, in the town of North Bend, upon which is situated a two-story building 38x70 feet, the lower floor being occupied by Hines as a storeroom; and lots 1, 2 and 3 in block 45, without improvement. The day following the levy, Hines, assisted by the sheriff and S. Bachy and J. W. Grout, took an inventory of the stock in the store, which footed up to $3,278.84. The original cost price, which was ascertained from the markings upon the different articles going to make up the stock, or from the bills of purchase where the marking could not be found, was made the basis of valuation. No allowance was made for shopworn goods, as it was said the stock was "not very old." Bachy and Grout concur with Hines as to the manner of taking the inventory. I am satisfied that it was fairly made upon the basis of the cost price to Hines when he purchased the goods in the first instance. Hines testifies that at the time of the attachment he had some bills that amounted to as much as $200; the amount set down being $250. He further states that he had $350 in cash, which also appears to have gotten into the inventory. This comprises the whole of his personal property.

Lot 3, block 19, upon which the store building is situated, is incumbered by a mortgage of $1,000. The value of this piece of realty is variously estimated by the witnesses, ranging from $3,000 to $4,500. The lot cost the defendant, on February 10, 1904, $1,000, excavation $300, and for construction of store building about $2,000—thus aggregating $3,300. As to lots 1,

2, and 3 of block 45, Hines testifies that he paid for them $200 each, or for the whole $600. These were valued by witnesses ranging from $800 to $1,050. Hines had made some improvement upon them, by way of clearing them in part of brush and timber, at a cost, he affirms, of about $100. Touching the value of the stock of merchandise, several witnesses testify that it is worth, at sheriff's sale, being under attachment, from 50 to 65 and 70 cents on the inventoried value; that it would not bring more than these figures at forced sale. Two witnesses, H. Lockhart and H. J. Edwards, testify to the value of the stock if disposed of in bulk, while the concern was in active operation. Lockhart says the discount to be allowed upon the invoice price "is a matter to be agreed upon between the buyer and seller; it depends upon the age of the stock and its condition, and the value of the business. Twenty-five per cent. is the maximum amount generally allowed in such cases; discount sometimes being greatly in excess of that." Edwards corroborates this view, and no one controverts it. It seems, therefore, that the probable marketable value of this stock of goods, being in good condition, that is, "not very old," if then sold in bulk, prior to attachment and while the venture was a going concern, would have approximated 75 per cent. of the invoice, or $2,459.13. Such an estimate is the only one reasonably deducible under the evidence. The value of the accounts or bills has not been proved. Hines says, in effect, they amounted to $200 or $250, but he gives no itemized statement thereof, nor any information whatever as to whether they are against solvent persons. He may have had the bills, perhaps did, but they may have been worthless. As to their value, he makes no suggestion or statement. The cash item must be admitted, although the testimony is meager as to that. The estimates of value placed on the store property were based, sometimes upon the estimated rental value (it not having been shown that any part of the building had been rented, except six of the upper rooms at $15 per month), and sometimes upon the witness' opinion of the value of real property in North Bend, without reference to any particular standard, as actual sales of property and the like. There appears to be no estimate by any witness of sale values in the market at the time of the attachment. Charles Windsor, cashier of the North Bend Bank, testifies that in his opinion the property was worth from $3,000 to $3,500. He was a witness for the defendant, and his statement approximates the

original cost of the property to Hines—the purchase price of the lot and the cost of excavation and building. There is yet no evidence, however, that the property was worth in the market what it cost the owner. There is evidence that the value of property has increased since Hines purchased, but there is much that property values have been vacillating in range, and, while there is much uncertainty in the testimony from which to form an opinion, I am impelled to the conclusion that the cost value is approximately what the sale value was at the time of the judgment and levy, thus rating lot 3, block 19, at $3,300. It was probably not worth less than this.

As respects lots 1, 2, and 3, of block 45, it appears from developments in the testimony that Hines never acquired the legal title to them, nor is it very clear that he has such an equitable right as entitles him under any condition to the legal title. J. L. Simpson, of the Simpson Lumber Company, who at the time held the legal title to the lots in trust for the company, testifies that he sold the lots to Hines at $600; that the amount was included in a note given by Hines to the lumber company on settlement; and that the note is the same as sued on by Guerry. So that it appears that nothing was paid down on the lots, and this is shown by an account rendered by the lumber company to Hines at the time of the alleged settlement. When it was inquired whether Hines had a written contract for the purchase of the lots, neither he nor Simpson was sure that any such contract was ever executed, and none was or could be produced at the trial. This leaves nothing but possessory title and some improvements made upon the lots, by way of clearing them of brush and timber, upon which to base his right to the legal title. These are shadowy and not well established. Coupled therewith, it is not entirely clear that Hines did not intend that the title to these lots should remain in doubtful validity until his creditors were appeased. Consequently, he is not entitled to have them included among his assets for the purpose of determining his solvency.

As to the remainder of his property, I find no purpose on his part to cover or conceal any part of it with a view to putting the same beyond the reach of his creditors. His entire property, therefore, to which he was entitled, at its fair valuation at the time of the judgment, consists of stock of merchandise, $2,459.13; lot 3, block 19, North Bend, $3,300; and cash on hand, $350—aggregating $6,109.13. The defendant's schedule of indebted-

ness shows an aggregate of $5,867.78. To this schedule should be added accrued interest on mortgage, $20; to Wm. Cluff Company's demand, $1.94; to Fleischner, Mayer & Co.'s, $36.08; to Wellman Peck & Co.'s, $10.15; to Cahn Nickelsburg & Co.'s, $11.92—making a total of liabilities in the sum of $5,947.87. Hines' property, at a fair valuation, therefore, exceeded his liabilities by $161.26, at the time of the entry of the judgment and levy.

It follows that he was not insolvent, and the petition in bankruptcy should be dismissed; and such will be the order of the court.

HUTTIG MFG. CO. v. EDWARDS

160 Fed. 619, 87 C. C. A. 521

(Circuit Court of Appeals, Eighth Circuit. March 27, 1908)

HOOK, Circuit Judge. The principal question on these appeals is whether the Huttig Manufacturing Company received a voidable preference when it took a mortgage on all of the property of D. Winter, bankrupt. As the mortgage was taken within the prohibited period of four months we proceed to inquire whether Winter was then insolvent, and if so, whether the manufacturing company or its agents acting therein had reasonable cause to believe a preference was intended. The trustee says he was insolvent because, first, he was a member of the firm of E. D. Winter & Co., also adjudged bankrupt, and the addition of D. Winter's debts and assets to those of the firm confessedly exhibited a condition of hopeless insolvency; and second, if D. Winter was not a member of the firm his debts exceeded the fair valuation of his property. We are of opinion the second contention is well taken, and therefore need not discuss the first. D. Winter's property consisted exclusively of real estate. His indebtedness arose from lending his credit to his son, E. D. Winter, who conducted the business of E. D. Winter & Co., and from holding himself out as a partner, though he may not have been one in fact. There are some expressions in the testimony, mostly if not wholly hearsay, that the real estate of D. Winter, including his homestead, was estimated to be worth from $18,000 to $20,000. The assessed value of all excepting the homestead was $16,000, of the homestead $1,200. The value fixed by sworn appraisers appointed in the bank-

ruptcy proceedings was $15,150, with $3,000 additional for the homestead. All that the trustee could obtain for the property exclusive of the homestead was $12,245.50. The proceeds were brought into court to abide the result of this litigation, and they were insufficient to pay the mortgage claim of the manufacturing company. When the mortgage was given D. Winter owed the manufacturing company $13,391.73, August Carstens $2,000, and the Merchants' National Bank of Burlington, Iowa, $2,700, a total of $18,091.73. He also owed the bank an additional $5,500 on two notes, but they were dated after the mortgage in question, and it was not shown they were renewals of prior notes or when the indebtedness originated. It is contended by the manufacturing company that the $13,391.73 for which it took the mortgage was not D. Winter's debt, and should not be considered in determining his solvency or insolvency. It was for goods sold by the manufacturing company to E. D. Winter & Co., and it is admitted D. Winter guaranteed the debt before it was incurred. The trustee says the guaranty was by a writing in which D. Winter also held himself out as a member of the firm, while the manufacturing company contends the signature of D. Winter to the writing was a forgery by E. D. Winter, his son, and that the guaranty was an oral one. In either event we think the amount of the debt directly affected D. Winter's solvency. A surety or indorser for a bankrupt has been held to be a creditor within the meaning of the bankruptcy law (Kobusch v. Hand [C. C. A.] 156 Fed. 660; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 13); and upon the same principle a guarantor liable upon a fixed, liquidated demand as this was, is a debtor to him who holds it, and his liability is to be counted in determining his financial status. That the guaranty may have been oral and therefore within the statute of frauds of Iowa where the transaction occurred is immaterial. The Iowa statute relates merely to the evidence or proof of the undertaking, and not to its validity. Berryhill v. Jones, 35 Iowa, 335; Merchant v. O'Rourke, 111 Iowa, 351, 82 N. W. 759. In the latter case it was said:

"The statute of frauds does not prohibit an oral contract nor make such an agreement illegal because certain formalities are not complied with, but relates only to the method by which proof may be made in an attempt to enforce it."

The manufacturing company asserted and D. Winter admitted the validity of the demand against him, and the former is not

in position to say the latter was solvent because his property, all of which it took under its mortgage, was sufficient to pay his other creditors. If the mortgage held, the other creditors would get nothing, and the solvency of the debtor would seem quite unsubstantial.

There is another matter affecting the financial condition of D. Winter. Some letters were received in evidence to which his name was signed, and which stated he was a member of E. D. Winter & Co. and liable for their debts. One of these letters was to a mercantile agency which made it the basis of commercial reports upon the faith of which Welt & Reddelsheimer sold the firm goods amounting to $914.70. The genuineness of the signature to the letter was attacked, but there were received in evidence before the referee for purposes of comparison admitted writings of D. Winter, and his decision that D. Winter so held himself out as liable, affirmed as it was by the District Court, should not be disturbed. It is altogether probable that D. Winter owed much more, but the debts mentioned rendered him insolvent when he made the mortgage. We are also convinced he knew it. He had previously given his daughter all his household effects and jewels in order, as he said, "to avoid all trouble for her in the future." He was conscious of being deeply involved with his son who conducted the business of E. D. Winter & Co., and he included in the mortgage to the manufacturing company all of the property he had left. The necessary effect of the mortgage was to give the mortgagee a preference over other creditors.

The referee in bankruptcy and the District Court found the manufacturing company had reasonable grounds to believe a preference was intended. An attentive consideration of the evidence and the fair inferences to be drawn from the facts admitted or proved lead us to the conclusion the finding is adequately supported. * * *

The decree of the District Court is * * * affirmed.

SANBORN, Circuit Judge (dissenting). I am unable to assent to the opinion and the conclusion of the majority in this case because in my opinion the competent evidence presented fails to prove that D. Winter was insolvent, or that the Huttig Manufacturing Company had reasonable cause to believe that he was insolvent when he gave the mortgage, and it seems to me that there is no substantial competent evidence that he or any

other person with his knowledge or permission ever held him out to creditors who relied upon such holding as a member of the firm of E. D. Winter & Co.

B. Debts Amounting to $1,000 or Over

§ 4b. Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation, except a municipal, railroad, insurance, or banking corporation, *owing debts to the amount of one thousand dollars or over,* may be adjudged an involuntary bankrupt.
* * *

§ 1 (11). "Debt" shall include any debt, demand, or claim provable in bankruptcy.[3]

C. Petitioning Creditors

§ 59b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.[4]

3—The matter of provable claims will be taken up under the head of administration, see pages 384-476, *post.*

4—As to the right of a creditor, who has assented to an assignment by the alleged bankrupt for the benefit of his creditors, to join in a petition based on the assignment as an act of bankruptcy under § 3a (4), see Moulton v. Coburn, 131 Fed. 201, 66 C. C. A. 90 (certiorari denied, 196 U. S. 640, 49 L. ed. 631, 25 Sup. Ct. 796); Canner v. Webster Tapper Co., 168 Fed. 519, 93 C. C. A., 541. As to whether such assenting creditor should be counted in determining the number of creditors, see Stevens v. Neve-McCord Merc. Co., 150 Fed. 71, 80 C. C. A. 25. As to status of preferred creditors, see In re Smith, 176 Fed. 426. As to amendments to petition, see Manning v. Evans, 156 Fed. 106; In re Charles Town L. & P. Co., 183 Fed. 160.

As to time when petitioner must have been a creditor, see Brake v. Callison, 129 Fed. 201, 63 C. C. A. 359 (affirming 130 Fed. 987); In re Perry & Whitney Co., 172 Fed. 745; In re Hanyon, 180 Fed. 498 (affirmed 181 Fed. 1021, 104 C. C. A. 667); In re Stone, 206 Fed. 356.

D. Acts of Bankruptcy

1. Conveyances with intent to hinder, delay or defraud [a]

GOWING v. RICH

1 Ired. L. 553

(Supreme Court of North Carolina. June, 1841)

This was an action of ejectment, tried at Davie Superior Court of Law at Fall Term, 1840, before his Honor Judge Pearson. Both parties claimed under one Sheeks. The defendant admitted himself in possession. The plaintiff offered in evidence a judgment in favor of one Alexander against one Chloe Oaks and others, an execution thereon and a sheriff's deed to himself, conveying all the interest of the said Chloe Oaks. The plaintiff then offered evidence to prove, that the said Chloe Oaks in the year 1836, while the suit of Alexander, which was for a debt of about $2,500 was pending, had sold a negro and had sold her home place for $700, and had contracted verbally to buy the land in question of Sheeks for $1,250; that, on the day agreed upon to execute the writings, Sheeks went to the house of Mrs. Oaks, when he was informed by Mrs. Hoskins, who was the daughter of Mrs. Oaks and the widow of one Hoskins, who had died a few years before insolvent, leaving his widow destitute and dependant upon her mother for support, that she was to buy the land and would pay for it and take the deed in her own name. Sheeks expressed himself willing to make the deed to whoever paid him the money, and, accordingly, with the knowledge and consent of Mrs. Oaks, he made the deed to Mrs. Hoskins and received from her $700 in cash, of which $600 was in one hundred dollar bills, and took Mrs. Hoskins' note under seal for the balance, $550. Sheeks stated that he took Mrs. Hoskins' note without security, because he was told and believed that the land was bound to him for the purchase money. The plaintiff then offered evidence to prove that Mrs. Oaks had bought and paid for the land; that the $700 paid was her money, which she had handed to Mrs. Hoskins, with the understanding that the deed was to be taken in the name of Mrs. Hoskins to keep off the creditors of Mrs. Oaks; and that Mrs. Hoskins was to execute the note for the balance of the purchase money, but Mrs. Oaks was to pay it. The defendant offered evidence to shew that the $700

[a] The statute of 13 Elizabeth, and an early New York statute, the pattern for much of the American legislation on this subject, will be found in the Appendix, *post*. pp. 715-718.

was the money of Mrs. Hoskins—that a few months after the deed was executed and after Mrs. Oaks and Mrs. Hoskins had taken possession of their new home, the land in question, he had married Mrs. Hoskins, without notice of any implied trust in Mrs. Oaks, and had been compelled to pay the note of $550 executed by his wife. The plaintiff's counsel insisted, that, if in fact Mrs. Oaks had bought the land and paid $700 of the price and agreed to pay the balance, and made use of Mrs. Hoskins' name in the deed and in the note, as a cover to keep off creditors, then Mrs. Oaks had a trust estate, which was subject to execution sale under the act of 1812. The defendant's counsel insisted, 1st, that supposing the facts to be as contended for by the plaintiff's counsel and that Mrs. Oaks had an implied trust, the purchaser of this trust under the act of 1812, did not acquire the legal title, but his remedy was in equity. 2dly, That the act of 1812 did not take within its operation an implied trust. 3dly, That the defendant, as husband, was a purchaser for valuable consideration, and, if he married without notice, he was not bound by the trust. 4thly, That, taking the facts to be as contended for by the plaintiff, yet if the jury were satisfied that the defendant had married without notice of the understanding that Mrs. Oaks was to pay the $550 note, and had been compelled to pay the amount himself, then although Mrs. Oaks had a trust to the amount of $700, yet he also had a trust to the amount paid by him, and the case would not come within the operation of the act of 1812. 5thly, The defendant's counsel insisted, as a matter of fact to the jury, that the land was bought and paid for by Mrs. Hoskins for her own use and out of her own money, and insisted that it made no difference how she obtained the money, whether by loan from Mrs. Oaks or from her other relations, or by secreting it out of her husband's effects, provided it was not, at the time she paid it, the money of Mrs. Oaks.

The court charged that to entitle the plaintiff to recover the jury must be satisfied that Mrs. Oaks had bought the land, and had, for the purpose of avoiding her creditors, resorted to the plan of handing the $700 to Mrs. Hoskins, and getting her to pay it over, and get the deed in her name and execute the note, with the understanding that Mrs. Oaks was to pay the amount of the note when due; that if these were the facts, then, although the legal title was vested in Mrs. Hoskins by the deed of Sheeks, still she held the land in trust for Mrs. Oaks, and

this was such a trust as was liable to execution; and the plaintiff, as purchaser under the sheriff's sale, by virtue of the act of 1812, acquired not only the trust estate of Mrs. Oaks, but also the legal estate of Mrs. Hoskins, and was entitled to recover in this action—that the position taken by the defendant's counsel, that a husband, marrying without notice, was considered in the light of a purchaser for a valuable consideration, discharged of the trust, was not true; for the husband, taking by operation of law, stood in the place of the wife, and took no greater estate, and was bound by the trust, whether he had notice or not—that so far as the $550 note was concerned, if it was a part of the understanding that the note was to be given in the name of Mrs. Hoskins, but Mrs. Oaks was to pay it, then, though the defendant, by marrying Mrs. Hoskins, made himself liable for the note, and had in fact been compelled to pay it; still his paying it would not alter the case, but would only place him in the situation of a security, who had paid money for Mrs. Oaks, without thereby acquiring a lien upon the land or any interest in the land. On the other hand, if the jury were not satisfied that the money was the money of Mrs. Oaks, but came to the conclusion that Mrs. Hoskins had procured it either by loan from Mrs. Oaks or in any other way; or, supposing the money was Mrs. Oaks', if the jury were not satisfied that Mrs. Hoskins gave the note in her name with the understanding that Mrs. Oaks was to pay it, then the defendant would be entitled to a verdict; for if Mrs. Hoskins gave the note expecting to pay it herself, then the trust estate would be divided, and Mrs. Hoskins would hold the land in trust for Mrs. Oaks as to the $700, supposing that to have been her money, and in trust for herself as to the amount of the note, and thus would be presented the case of a mixed trust, which does not come within the operation of the act of 1812.

There was a verdict for the plaintiff; a motion for a new trial for error in the opinion of the court was discharged, and, judgment being thereupon rendered for the plaintiff, the defendant appealed.

RUFFIN, C. J. In the instructions to the jury, the intentions of the parties and the true character of the transaction, upon which the deed was made to Hoskins, were fairly submitted to them. It must, therefore, be assumed, upon this verdict, that the contract of purchase was made by Oaks for her

own benefit, that the sum paid, $700, was her money, and that she was to pay the residue of the purchase money, $550; and that she did not give her own note as a security therefor, but procured her daughter to give her note, with the understanding that Oaks should pay it; and that this was done with the view to conceal the interest of Oaks from her creditors and prevent them from seeking satisfaction of their debts out of the land. We are then to treat this as a strong case of bad faith, in which clearly the daughter held upon a secret agreement and in confidence for the mother. In such a case, it would be a reproach to any system of jurisprudence, if it provided no means of reaching the land or the interest of the mother in it, for the payment of her debts. We doubt not but her interest may be made liable for her debts; but the question is, whether it be so liable as to be the subject of sale under a *fieri facias* on a judgment at law, and whether the purchaser at such a sale gets the legal title? Upon that question, after deliberation, we have come to a conclusion differing from the opinion held by his Honor.

Before the act of 1812, which made trust property subject to legal execution, such an interest as this certainly could not be reached at law. It was the constant practice, both in England and this country, for a purchaser to take his conveyance to a trustee; and it was allowed, though such conveyance defeated dower, and prevented the redress of creditors at law, and obliged them to sue in a court of equity. The act of 1812 altered and corrected that, in cases, in which a person is seized simply and purely for the debtor, without any beneficial interest in the party having the legal title or in any other person except the debtor in execution. Brown v. Graves, 4 Hawks, 342; Gillis v. McKay, 4 Dev. 172. The reason for thus confining the operation of the act is, that it divests the whole legal estate of the trustee, and, therefore, can only extend to a case, in which the trustee does not need that title to subserve the rights of himself or third persons. The act embraces, therefore, only the case in which the debtor in execution might call upon the trustee for a conveyance of the legal estate, or, at the least, if there were several equitable joint tenants for a conveyance of such part of the legal estate, as would be commensurate with his equitable right. The act in no case gives to the creditor of the *cestui que trust* an interest or power over the estate, legal or equitable, greater than that to which the *cestui que trust* may be entitled.

The purchaser holds the land exactly as the debtor held the trust. The act does not, therefore, at all proceed on the idea of a fraud in the creation of the trust; or provide that, by reason thereof, the trustee shall be deprived of any interest in himself, derived by the same conveyance. But it is founded on the fact that the debtor, being entitled to the trust, is, in equity and in substance, the owner of the land, and therefore, that it ought to be liable to be sold for his debts. The interest of the debtor, as *cestui que trust*, is the subject of sale and the purchaser can get no more. He therefore is to stand precisely in the shoes of the debtor, except that the debtor would have been obliged to apply to the chancellor to obtain the legal title; whereas the purchaser gets that also by the sheriff's deed. The question then is, whether, as between the debtor in execution and the person having the legal title, the former could, in the state of the dealings between them, call for an immediate conveyance from the latter? Now we are clearly of opinion, that the daughter would not have been compelled to convey to the mother, without first being discharged from her note, given for a part of the purchase money, or, after the money was paid, without its being repaid. If Oaks had given her note and Hoskins had executed it as her surety, the latter would have been entitled to retain the legal title as a security in the nature of a mortgage. This is the same case in substance. Hoskins gave her note for Oaks' debt, and the latter agreed, as she ought, to pay it. But she did not, and the former paid it; and, being for the purchase money of this very land, the title could not be taken from her, without making her whole. As between these parties, that cannot be denied. But it is contended, the bad faith towards the mother's creditors is an ingredient in the case, which repels all claim of the daughter upon the land, as against the creditors, and gives them a higher right than the mother. Not, we think, under this act of 1812. We have already endeavored to shew, that the remedy given by it does not stand on the footing of fraud. But another view will render this still clearer. If there was an intention to defraud creditors, then it is a settled principle, that equity will help neither party to such a contract; and, consequently, the mother could not have had a decree against the daughter for a conveyance, nor could the creditor of the mother, that is to say, by way of insisting on such a trust and asking its execution, since that would be to affirm and enforce a fraudulent intent. The remedy of the creditor is founded

on a different principle, which is, the right in equity to follow the funds of the debtor. Dobson v. Erwin, 1 Dev. & Bat. 569. When the estate was once in the debtor and has been conveyed by him in trust for himself, the redress of the creditor is plain at law upon either of two grounds. He may sell the trust, and that will, under the act of 1812, carry the legal estate; or he may treat the conveyance as fraudulent and null *ab initio* under the act of 13th Eliz. (Rev. St., c. 50, § 1), and therefore as leaving the legal title in the debtor. But this last is invoking another statute which is not applicable to a case like that before us; which is not of a conveyance by a debtor of land before owned by her, but that of a purchase by the debtor and a conveyance to a trustee for her. That the statute of Eliz. does not apply to the case of a purchase by the debtor is clear from the consideration, that it operates entirely by *making void* the assurances within its purview. In this case, that would leave the title in Sheeks, which would not serve the plaintiff's purpose. As has been already mentioned, however, before the statute 29th Charles 2nd, from which our act of 1812 is taken, purchases were daily made in England in the name of trustees; and, though equity found means of paying out of the estate the debts of the person, who, in the view of that court, was the owner, yet the purchase and conveyance to the trustee were never deemed within the statute of Elizabeth, so as to subject the land to a legal judgment and execution. That was the cause of passing the acts to operate at law on the trusts, *qua* trusts. And they have never been construed to give more to the creditor than the debtor could equitably claim, nor to apply to a case in which the debtor could not, immediately and unconditionally claim a conveyance of the legal estate. As Oaks could not, in this case, have done that, but must have indemnified Hoskins or her husband for the money paid as her surety, in part of the purchase money, the case is not within the act of 1812, and the land was not subject to be sold under execution.

PER CURIAM. Judgment reversed and *venire de novo* awarded.[5]

5—See also Webster v. Folsom, 58 Me. 230; Cone v. Hamilton, 102 Mass. 56; Mulford v. Peterson, 35 N. J. L. 127, 133; Garfield v. Hatmaker, 15 N. Y. 475; Dewey v. Long, 35 Vt. 564. As an example of statutory provision affecting the situation, see Consol. Laws of New York, c. 50, § 94.

KIMMEL v. M'RIGHT

2 Pa. St. 38

(Supreme Court of Pennsylvania. September Term, 1845)

Error to the Common Pleas of Westmoreland county.

The plaintiff, as purchaser of George Kimmel's estate at sheriff's sale, brought ejectment against him. It appeared from the evidence, that Obadiah, a natural son of George, claimed the property under a conveyance from a stranger, and that his father lived in the house with him; but he was not named defendant on the record.

To avoid the effect of this conveyance, plaintiff showed that at the time of this purchase, which was subsequent to his judgment, Obadiah was but fourteen or sixteen years old. That his father made the bargain and handed him the money to pay the price. The defendant objected to evidence of a declaration by George Kimmel, that "he would buy land in Obadiah's name." The court told the jury the purchaser was entitled to recover, if George Kimmel had any beneficial interest in the land; that if he made the purchase at the time, and was indebted, a resulting trust would arise to him; though, as a general rule, such a trust would not arise, where the payment was not with consent of the grantee. Or if the jury found the purchase was with intent to defraud his creditors, they would be entitled to retain it, under 13 Eliz., against Obadiah.

The fourth point of defendant was, "That a man indebted is not prevented or prohibited by law from making a present of money, if he has it, to his children, that it is no fraud to do so." "We answer that the law is the reverse of the statement in this proposition."

ROGERS, J. No exception can be taken to the general charge, nor to the answer to the points, except the fourth. The court are made to say, that a man is prohibited from making a present of money to his children. As an abstract principle, nothing can be more erroneous, for undoubtedly, a man may do as he pleases with his own property. But the court must have intended, as appears very clearly from the general tenor of the charge, that a man who is largely indebted in proportion to his means, cannot give his property to his children at the expense of his creditors. And this certainly is the law, a man must be just before

he is generous. The title to the land passed from the several grantors to Obadiah; and as against his father, as it appears to have been a gift, he might have held the land. But the father, at the time of the several conveyances, was largely indebted; and these conveyances to his son were devices to cheat and defraud his creditors. As against them, by the statute of fraudulent conveyances, the title is utterly void.

We see no cause for complaint, admitting even the testimony of the declarations of Dr. Kimmel, that "now he would buy land, and that he would buy in Obadiah's name." If he was indebted at the time the declarations were made, it is pertinent testimony; if he was not, it is evidence in the defendant's favor, as it shows his honesty of purpose. In no point of view is he injured, and the court would be badly employed in reversing judgments for errors which work no mischief.

Judgment affirmed.[6]

NORCUTT v. DODD

Cr. & Ph. 100

(High Court of Chancery. January 29, 1841)

This suit was instituted by the assignee, under the insolvent debtor's act, of Robert Torre, one of the defendants, for the purpose of setting aside a voluntary assignment of an annuity to which he was entitled under his marriage settlement.

By the settlement, which bore date the 12th of April, 1832, and was made between Elizabeth Dodd, the intended wife of the first part; Robert Torre of the second part; William Dodd, the father of Elizabeth Dodd, of the third part; and Henry Le Keux and another person, as trustees, of the fourth part, William Dodd covenanted with Robert Torre, that in case the marriage should take effect, he, William Dodd, would, during the joint lives of himself and his daughter, pay to Robert Torre, or his assigns, the yearly sum of £50, as therein mentioned.

The marriage was solemnized on the 13th of April, 1832.

On the 17th of November, 1836, the plaintiff recovered judgment against Robert Torre, in an action of debt, for the sum of £70 and costs; but at the request of Robert Torre, who stated

6—Pennington v. Clifton, 11 Ind. 162; Hawkins v. Cramer, 63 Tex. 99 *acc.* See also Smith v. Patton, 194 Ill. 638, 62 N. E. 794; Bloomingdale v. Stein, 42 Ohio State 168.

that he expected to receive some money on the 19th of November, which would enable him to satisfy the plaintiff's debt, execution was delayed until that day. On the 19th of November, Robert Torre having again made default in payment, the plaintiff sued out a writ of execution; but the sheriff's officer, on coming to Robert Torre's house for the purpose of executing the writ, found another officer in possession of his goods, under a similar writ, at the suit of one Mottram, to whom Robert Torre had executed a warrant of attorney the day before, to enter up judgment against him for the sum of £72 10s. On the 22nd of November, a third writ was lodged with the officer so in possession of the goods, at the suit of one Perring, for £70. The officer continued in possession until the 2d of January, when the goods were sold by auction, and the net proceeds of the sale were not sufficient for the satisfaction of Mottram's debt.

On the 22d of December, 1836, Robert Torre executed a deed, by which he assigned the annuity to Henry Le Keux, in trust for the separate use of his wife; and in the month of May, 1837, he surrendered himself to prison, and was subsequently discharged under the insolvent debtors' act, after six months' confinement; and the plaintiff was duly chosen the assignee of his estate and effects.

The bill was filed against William Dodd, Henry Le Keux, and Robert Torre and Elizabeth his wife; and it prayed that the assignment might be declared fraudulent and void against the plaintiff and the other creditors of the insolvent; that an account might be taken of what was due to the plaintiff for the arrears of the annuity, and that William Dodd and Henry Le Keux might be decreed to pay to the plaintiff what should be found due from them respectively on account thereof, together with the costs of the suit.

The cause now came on to be heard before the Lord Chancellor.

THE LORD CHANCELLOR [Cottenham]. This being an assignment of a chose in action, and the debtor being still living, the transaction is not fraudulent under the statute of Eliz. alone; but under that statute, taken in connection with the insolvent debtors' act I am of opinion that it is. The difficulty which arose upon the statute of Eliz., with respect to voluntary assignments of choses in action, was, that, during the lifetime

of the debtor, creditors could not be said to be prejudiced by them, inasmuch as that species of property was not subject to be taken in execution; but after his death, it was otherwise, because then the creditors might reach all his personal property of whatever kind: and the same reason applies where the debtor has brought himself within the operation of the insolvent debtors' acts; because, under those acts, all his property becomes applicable to the payment of his debts. In the present case, however, there is no conclusive evidence that the debtor was indebted to the extent of insolvency at the time of the assignment, though the fact of their being three executions in his house at the time makes it highly probable. As to that, therefore, there must be an inquiry.[7] * * *

BRACKETT v. WATKINS

21 Wend. 68

(Supreme Court of New York. January, 1839)

Error from Onondaga Common Pleas. Brackett sued Watkins in an action of *replevin*, for taking 30 runs of woollen yarn. The plaintiff proved that he was a *householder*, and that in March, 1837, the yarn was taken from his possession by virtue of an execution in favor of the defendant, and by his direction. In March, 1836, the plaintiff purchased 300 sheep, which he sheared, and sold the whole of the wool except one large fleece of about 4 pounds. In the summer or autumn of the same year he sold the sheep he purchased in March. On this evidence the plaintiff rested. The defendant moved for a nonsuit, on the following grounds: 1. That it was not shown that the yarn in question was made from wool sheared from the plaintiff's own sheep; 2. That there was no evidence that the plaintiff did not own a large flock of sheep through 1836 and 1837; and 3. That the statute does not apply to a case where a man has a large flock of sheep and sells all the wool except ten fleeces. The court granted the nonsuit. The plaintiff excepted and brought error.

By the Court, COWEN, J. The first of the grounds taken by the defendant's counsel in the court below is now given up

7—See Edmunds v. Edmunds [1904], Prob. & Div. 362.

as erroneous, on the authority of Hall v. Penney, 11 Wendell, 44. By this case the words of the statute were equitably extended beyond their literal import, and made to cover cloth, yarn, etc., whether it comes from the sheep of the owner or not.

Nor can I perceive any force in the other points, when taken in the abstract. It was pretty evident, that the plaintiff had reduced himself to the 30 runs, and had no more. Being a householder, the statute conferred upon this the same protection, whether the plaintiff had before owned but 10 or 1,000 sheep. I say in the abstract. Very likely the court below were disgusted with the strong appearance of a fraud upon the statute, by a man disposing of, or covering up all his other property, and turning what was intended as a shield of poverty into an instrument of fraud. It is quite common for dishonest men to do so. But I think the court below have mistaken the remedy. If there be an appearance from circumstances that the plaintiff has reduced himself to exempt property, in order to defraud his creditors, that question should be submitted to the jury, under proper directions from the court. Their sagacity would be, in general, quite a match for the case. On their being satisfied that the plaintiff had placed himself on his exempt property in order to defraud his creditors, as in the instance below, by a sale of his sheep and wool, they may clearly place him beyond the reach of the statute, by sustaining the levy. His sales or other arrangements would come within the words of the statute, 13 *Elizabeth*, being to delay, hinder or defraud creditors; or, if not, they would be void at the common law. The rule, then, is this: *prima facie* the fleeces, yarn, cloth, and other things limited to a certain amount by the statute, 2 R. S. 290, par. 22, are protected. But if the jury believe that it was brought down to the compass of exemption, with intent to defraud creditors, they ought to find for the creditor. Most commonly, the other goods being mortgaged or sold, remain still in the debtor's possession, when either they may be seized, or those which are apparently exempt, at the election of the creditor. In general, the mortgaged or sold goods are seized. But the more artful debtor will fix a more secure cover for his property, by changing it into money, or something as little tangible to an execution as may be, when the property claimed as exempt must be resorted to, and the question of fraud litigated upon that. On such obvious fraud as possession after a mortgage or sale, the court may doubtless nonsuit, or direct the jury to find the covin,

since the statute has declared the possession to be conclusive evidence where it is not satisfactorily explained. Not so of more equivocal instances. On these the question is, in general, for the jury. We think it should have been put to them in the case before us.

The judgment must, therefore, be reversed, and a *venire de novo* go from the court below, the costs to abide the event.[8]

JOHNSON v. SILSBEE

49 N. H. 543

(Supreme Judicial Court of New Hampshire. June, 1870)

This was assumpsit brought by Johnson & Fisher against R. W. Silsbee, and one W. F. Howard, trustee. The only questions raised related to the liability of the trustee. The depositions of the trustee and others were submitted to the court from which the following facts appear. The trustee bought of defendant and of his daughter, J. Arlette Silsbee a sewing machine. for which he agreed to pay the sum of $65.00, no part of which had been paid. They both spoke of the machine as belonging to the daughter, and the trustee understood at the time that it was hers, though her father assisted her in the sale. This machine was purchased by the said J. Arlette of her uncle in Buffalo, N. Y., and she had paid $20.00 cash towards it, and was to have a commission of $5.00 or more on it if she sold it, so that she only owed about $40.00 for it when she sold it. The said J. Arlette Silsbee was and is a minor daughter of defendant, who lives at home with him and acts as housekeeper for her father. He has always boarded and clothed her as other fathers generally board and clothe their daughters, and she has always remained a member of his family and been supported there. She is not emancipated and her father has never given her her time or earnings by any express gift or contract. But she has, with his consent, worked at sewing for the neighbors and earned small sums of money, which have been paid to her, and her father has never claimed them or undertaken to control his

8—See Wilcox v. Hawley, 31 N. Y. 648; Bishop v. Johnson, 15 N. Y. St. Rep. 579; O'Donnell v. Segar, 25 Mich. 367; Comstock v. Bechtel, 63 Wis. 656, 24 N. W. 465; Hetrick v. Campbell, 14 Pa. St. 263; Rose v. Sharpless, 33 Gratt. 153; White v. Givens, 29 La. Ann. 571.

daughter in the manner of spending the same, but she has expended a portion of such earnings in purchasing clothing for herself, and the $20.00 paid towards this sewing machine was earned in that way, and paid by the daughter without any direction from the father or any objection on his part. Upon these facts the plaintiffs claim to charge the trustee for the value of the machine ($65.00), but if they cannot hold that amount then they claim to hold him for the value of the machine, less the amount remaining due for the same; while the defendant and his daughter claim that the trustee cannot be charged for anything.

SMITH, J. There is no evidence that the minor bought the machine for, or on behalf of, her father.

Apart from the fact that the twenty dollars paid came from her earnings, there could be no doubt that the machine was the property of the minor. So far as it was bought on credit, it was on her credit, not on her father's. Although a father is entitled to the earnings of his child as a recompense for his liability to support the child, he has no power over his child's estate except as his trustee or guardian; 1 Blackstone's Com. 453. "He has no title to the property of the child, nor is the capacity or right of the latter to take property or receive money by grant, gift or otherwise, except as a compensation for services, in any degree qualified or limited during minority. Whatever therefore an infant acquires which does not come to him as a compensation for services rendered, belongs absolutely to him, and his father cannot interpose any claim to it;" see Bigelow, C. J., in Banks v. Conant, 14 Allen, 497, p. 498; Wendell v. Pierce, 13 N. H. 502. If therefore the father had any interest in this machine, it must have been solely by reason of the fact that it was partly paid for out of the earnings of his daughter.

In the present case, upon the evidence in the depositions, we find, as matter of fact, that, when the daughter began to do the work by which she earned the twenty dollars, the father consented, in good faith that the wages to be earned by that labor, should belong to the daughter.

The father did not "put his consent into words;" but his acts (as detailed in the depositions) relative to the daughter's employment at various times in sewing, and as to her disposition of the sums which had thus been earned, justify the inference that he so consented on this occasion, and thus express

his consent as effectually "as words would have done;" see 5 Am. Law Review, 11, 12. Can this relinquishment of the father's right to the daughter's future earnings be avoided by his existing creditors as fraudulent in law?

A debtor cannot give away his attachable property, to the prejudice of existing creditors. But his time and talents are at his own disposal. If the debtor, instead of laboring to earn wages which his creditors can attach by the trustee process, chooses to remain idle, or "to give away his own services by working gratuitously for another," his creditors have no legal remedy. They "cannot compel him to work and earn wages for their benefit." The laws of this state do not authorize "the sale of the person of a debtor for the satisfaction of his debts." Abbey v. Deyo, 44 N. Y. 353, pp. 346-9; Bush v. Vought, 55 Penn. State, 437, p. 441; see also Williams v. Chambers, 10 Queen's Bench, 337; Chippendale v. Tomlinson, 4 Douglas, 318.

If the father can give away his own labor, by working gratuitously for another, why may he not also give away his right to the future labor of his child? The creditors of the father cannot attach, or sell upon execution, the child's capacity to labor. Practically, the father's right to the child's prospective earnings is worthless unless the father and the child both choose to make it valuable. There is no legal process, by which the creditors can compel the father, to make the son labor for their benefit. No law requires the father "to work his son or his daughter as he would work a horse or a slave for the benefit of his creditors." Black, J., in McCloskey v. Cyphert, 27 Penn. State, 220, p. 225.

If the father can give to a third person the right to his daughter's future services, can there be any valid objection to his giving this right to the daughter herself? We are not to pass upon this question without giving some consideration to the interests of the daughter. She is not a chattel, but is entitled to the care and protection of the law, just as much as her father's creditors. See Parker, C. J., in Whiting v. Earle, 3 Pick. 201, p. 202; Isham, J., in Bray v. Wheeler, 29 Vt. 514, pp. 516-7. If they can take her future earnings against her will, and her father's will, she is, in effect reduced "to a condition of qualified slavery." The law does not contemplate the subjection of the child to any person not standing *in loco parentis*. The consequences to the child of denying the father's power to relinquish his right to the child's future earnings,

would often prove extremely pernicious. If a son anticipates that his wages will be applied, against his father's will, to pay his father's debts, it is hardly probable that he will labor with much vigor, or earn anything above his support. The creditors will generally gain nothing, but the son may be ruined by the absence, at the most important time of his life, of some of the strongest incentives to the formation of industrious habits. We are not now considering the validity of a gift by the father of a claim for wages already due for his own past services, or of a gift by the father of his claim for wages already earned by labor which his minor child has performed without any previous understanding that the avails should go to the child's own use. Nor is this a case where the arrangement between the father and the child was merely colorable, designed by the parties to cover the earnings of the daughter for the father's use and benefit, and in fraud of his creditors. See Gragg v. Martin, 12 Allen, 498. In the present case, the father, in good faith, consented that his minor daughter should receive to her own use, her future earnings in a certain employment. His creditors cannot interpose to take from the daughter wages earned by her in that employment subsequently to the father's relinquishment of his right. See Wolcott v. Rickey, 22 Iowa, 171; McCloskey v. Cyphert, 27 Penn. 220; Lyon v. Bolling, 14 Ala. 753; Bobo v. Bryson, 21 Ark. 387; Lord v. Poor, 10 Shepley, 569; Bray v. Wheeler, 29 Vt. 514; Manchester v. Smith, 12 Pick. 113; Whiting v. Earle, 3 Pick. 201; Jenney v. Alden, 12 Mass. 375.

It seems to have been asserted, that a *bona fide* relinquishment by a husband to his wife, of his marital right to the wife's future earnings, is invalid as against the husband's creditors. See 2 Story's Equity Jur. § 1387. If the reason of such a doctrine is found in the common law disability of a husband to contract with his wife, it can have no application to the present case. If the doctrine can be sustained at all, it must be as an exception, growing out of the peculiar *status* of the parties; and not as a rule based upon general principles, applicable alike to husband and wife, and parent and child.

The right of the daughter to hold the twenty dollars against her father's creditors, does not depend on the question whether she had [been] fully emancipated, or had ceased to receive any support from her father. If she performed the labor, by which that sum was earned, upon an understanding with her father

that she should receive the avails of that labor, that understanding cannot be treated as a nullity merely, because it did not extend to all other labor which the daughter might perform during minority. A partial relinquishment of the parental right avails *pro tanto:* see Tillotson v. McCrillis, 11 Vt. 477, p. 480. Notwithstanding the decision in Godfrey v. Hays, 6 Ala. 501, we think that the fact that the daughter remained a member of her father's family is material only as evidence to be weighed in determining whether the alleged relinquishment by the father was an act done in good faith, or merely colorable. In many instances where minors are allowed to control their own earnings, it may reasonably be expected, that they will support themselves out of those earnings, and thus diminish the claims on their parents. The probability of such a result has had some weight in inducing courts to deny the right of creditors to take the fruits of the minor's labor. But we do not understand that the use which the minor makes of his earnings is the test of his right to those earnings; nor that the continuing liability of the father to support the minor is fatal to the minor's claim to control his own earnings. If it were otherwise, no emancipation by the father could ever be of any validity against his creditors; for it is clear that a father cannot, by his own act, "cast his son upon the public, and relieve himself from the obligation of maintenance" imposed upon him by the pauper laws (see Gen. Stat. c. 74, § 8). The usual clause in "freedom notices," in which the father declares that he will pay none of the son's debts, can hardly have the full effect which many fathers may imagine; see Bell, C. J., in Hall v. Hall, 44 N. H. 293, pp. 295, 296; 1 Parsons on Contracts, 5th ed., 310, 311. The continued receipt by the minor of support from his father is competent evidence upon the question, whether the father's alleged relinquishment of his right to any portion of the minor's future earnings was a reality or a mere sham; and it is not difficult to imagine cases where such evidence would carry decisive conviction of the colorable nature of the alleged relinquishment. But proof of this fact does not give rise to a conclusive legal presumption of fraud. In the present case, it seems not improbable that the daughter's services as her father's housekeeper fully compensated him for her support.

We find that his consent to her receipt of the money earned by sewing was given in good faith, and was not designed to

cover up the daughter's earnings for the father's benefit in fraud of his creditors. It follows that the plaintiffs, though assumed to be existing creditors of the father, had no claim on the twenty dollars; and of course have no claim upon the property purchased therewith.

If we had held that the twenty dollars should be regarded as the father's money, it might have been necessary to inquire whether that sum was paid down at the time of purchase, or whether the machine was purchased wholly upon the daughter's credit and the sum of twenty dollars was afterwards applied by the daughter in part payment of her debt; see Adams on Equity, 143, 144; 1 Leading Cases in Equity, 3 Am. ed. 275; Francestown v. Deering, 41 N. H. 438; 2 Story on Equity Jurisp., §§ 1258-9; Taylor v. Plumer, 3 Maule & Selwyn, 562; 2 Kent's Com. 623.

Caswell v. Hill, 47 N. H. 407, is not directly in point. There the court found, as a matter of fact, that the transaction relative to the musical instrument was, really, "nothing more nor less than a gift of this instrument" by a step-father to his step-daughter; and the gift was of course held invalid as against his existing creditors.

Trustee discharged.[9]

CENTRAL NAT. BANK v. HUME

128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. 41

(United States Supreme Court. November 12, 1888)

On the 23d of April, 1872, in consideration of an annual premium of $230.89, the Life Insurance Company of Virginia issued at Petersburgh, in that commonwealth, a policy of insurance on the life of Thomas L. Hume, of Washington, D. C., for the term of his natural life, in the sum of $10,000, for the sole use and benefit of his wife, Annie Graham Hume, and his children, payment to be made to them, their heirs, executors, or assigns, at Petersburgh, Va. The charter of the company provided as follows: "Any policy of insurance issued by the Life Insurance Company of Virginia on the life of any person, expressed to be for the benefit of any married woman, whether the same be

9—*Cf.* Tucky v. Lovell, 8 Idaho, 731, 71 Pac. 122; Delaney v. Green, 4 Harr. (Del.) 285.

effected originally by herself or her husband, or by any other person, or whether the premiums thereafter be paid by herself or her husband or any other person as aforesaid, shall inure for her sole and separate use and benefit, and that of her or her husband's children, if any, as may be expressed in said policy, and shall be held by her free from the control or claim of her husband or his creditors, or of the person effecting the same and his creditors." (§ 7.) The application for this policy was made on behalf of the wife and children by Thomas L. Hume, who signed the same for them. The premium of $230.89 was reduced by annual dividends of $34.71 to $196.18, which sum was regularly paid on the 23d of April, 1872, and each year thereafter, up to and including the 23d of April, 1881. On the 28th of March, 1880, the Hartford Life & Annuity Company of Hartford, Conn., issued five certificates of insurance upon the life of Thomas L. Hume, of $1,000 each, payable at Hartford, to his wife, Annie G. Hume, if living, but otherwise to his legal representatives. Upon each of these certificates a premium of $10 was paid upon their issuance, amounting in all to $50; and thereafter certain other sums, amounting at the time of the death of Hume to $41.25. On the 17th of February, 1881, the Maryland Life Insurance Company of Baltimore issued, at Baltimore, a policy of insurance upon the life of Thomas L. Hume, in the sum of $10,000, for the term of his natural life, payable in the city of Baltimore to "the said insured, Annie G. Hume, for her sole use, her executors, administrators, or assigns;" the said policy being issued, as it recites on its face, in consideration of the sum of $337.20 to them duly paid by said Annie G. Hume, and of an annual premium of the same amount to be paid each year during the continuance of the policy. The application for this policy was signed "Annie G. Hume, by Thomas L. Hume," as is a recognized usage in such applications, and in accordance with instructions to that effect printed upon the policy.

The charter of the Maryland Life Insurance Company provides as follows: "§ 17. That it shall be lawful for any married woman, by herself, or in her name or in the name of any third person, with his consent, as her trustee, to cause to be insured in said company, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and, in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her to and for her own use, free

from the claims of the representatives of her husband; or of any of his creditors. In case of the death of the wife before the decease of the husband, the amount of the insurance may be made payable, after the death of the husband, to her children, or, if under age, to their guardian, for their use. In the event of there being no children, she may have power to devise, and, if dying intestate, then to go [to] the next of kin." The directions printed on the margin of the policy called especial attention to the provisions of the charter upon this subject, an extract from which was printed on the fourth page of the application. The amount of premium paid on this policy was $242.26, a loan having been deducted from the full premium of $337.20.

On the 13th of June, 1881, the Connecticut Mutual Life Insurance Company of Hartford, in consideration of an annual premium of $350.30, to be paid before the day of its date, issued a policy of insurance upon the life of Thomas L. Hume, in the sum of $10,000, for the term of his natural life, payable at Hartford to Annie G. Hume and her children by him, or their legal representatives. The application for this policy was signed "Annie G. Hume, by Thomas L. Hume." It was expressly provided, as part of the contract, that the policy was issued and delivered at Hartford, in the state of Connecticut, and was "to be in all respects construed and determined in accordance with the laws of that state." The "statute of Connecticut, respecting policies of insurance issued for the benefit of married women," was printed upon the policy under that heading, and is as follows: "Any policy of life insurance expressed to be for the benefit of a married woman, or assigned to her or in trust for her, shall inure to her separate use, or, in case of her decease before payment, to the use of her children or of her husband's children, as may be provided in such policy: provided, that if the annual premium on such policy shall exceed three hundred dollars, the amount of such excess, with interest, shall inure to the benefit of the creditors of the person paying the premiums; but if she shall die before the person insured, leaving no children of herself or husband, the policy shall become the property of the person who has paid the premiums, unless otherwise provided in such policy;" and this extract from the statute was printed upon the policy, and attention directed thereto. From the $350.30 premium the sum of $105 was deducted, to be charged against the policy in accordance with its terms, with interest, and $245.30 was therefore the sum paid.

The American Life Insurance & Trust Company of Philadelphia had also issued a policy in the sum of $5,000 on the life of Hume, payable to himself or his personal representatives, and this was collected by his administrators.

Thomas L. Hume died at Washington on the 23d of October, 1881, insolvent, his widow, Annie G. Hume, and six minor children, surviving him. November 2d, 1881, the Central National Bank of Washington, as the holder of certain promissory notes of Thomas L. Hume, amounting to several thousand dollars, filed a bill in the Supreme Court of the District of Columbia against Mrs. Hume and the Maryland Life Insurance Company, the case being numbered 7,906, alleging that the policy issued by the latter was procured while Hume was insolvent; that Hume paid the premium of $242.26 without complainant's knowledge or consent, and for the purpose of hindering, delaying, and defrauding the complainant and his other creditors; and praying for a restraining order on the insurance company from paying to, and Mrs. Hume from receiving, either for herself or children, the amount due pending the suit, and "that the amount of the said insurance policy may be decreed to be assets of said Thomas L. Hume applicable to the payment of debts owing by him at his death," etc. The temporary injunction was granted. On the 12th of November the insurance company filed its answer to the effect that Mrs. Hume obtained the insurance in her own name, and was entitled under the policy to the amount thereof, and setting up and relying upon the seventeenth section of its charter, quoted above. Mrs. Hume answered, November 16th, declaring that she applied for and procured the policy in question, and that it was not procured with fraudulent intent; that the estate of her father, A. H. Pickrell, who died in 1879, was the largest creditor of Hume's estate; that she is her father's residuary legatee; that the amount of the policy was intended, not only to provide for her, but also to secure her against loss; that her mother had furnished Hume with about a thousand dollars annually, to be used for her best interest, and that of his wife and children; and that the premium paid on the policy in question, and those paid on other policies, was and were paid out of money belonging to her father's estate, or out of the money of her mother, applied as directed and requested by the latter. * * *

The evidence tends to show that Hume's financial condition, as early as 1874, was such that, if called upon to respond on the

instant, he could not have met his liabilities, and that this condition grew gradually worse, until it culminated in irretrievable ruin, in the fall of 1881; but it also indicates that for several years, and up to October 21st, 1881, two days before his death, he was a partner in a going concern apparently of capital and credit; that he had a considerable amount of real estate, though most of it was heavily incumbered; that he was an active business man, not personally extravagant; and that he was, for two years prior to October, in receipt of moneys from his wife's mother, who had an income from her separate property. He seems to have received from Mrs. Pickrell, or the estate of Pickrell, his wife's father, of which Mrs. Hume was the residuary legatee, over $6,000 in 1879, over $3,000 in 1880, and over $1,700 in 1881. Mrs. Pickrell's fixed income was $1,000 a year from rents of her own property, which, after the death of her husband in May, 1879, was regularly paid over to Mr. Hume. She testifies that she told Hume that "he could use all that I [she] had for his own and his family's benefit, and that he could use it for anything he thought best;" that she had out of it herself from $200 to $250 a year from the death of Pickrell, in May, 1879, to that of Hume, in October, 1881; and that before his death Mr. Hume informed his wife and herself that he had insured his life for Mrs. Hume's benefit, but did not state where the premium money came from. Blackford, agent for the Maryland company, testified, under objection, that Hume told him in February, 1881, that certain means had been placed in his hands, to be invested for his wife and children, and he had concluded to take $10,000 in Blackford's agency, and should, some months later, take $10,000 in the Connecticut Mutual. He accordingly took the $10,000 in the Maryland, and subsequently, during the summer, informed Blackford that he had obtained the insurance in the Connecticut Mutual. Evidence was also adduced that Mr. Hume was largely indebted to Pickrell's estate, by reason of indorsements of his paper by Pickrell, and the use by him in raising money of securities belonging to the latter, and that said estate is involved in litigation, and its ultimate value problematical. The causes were ordered to be heard in the first instance at a general term of the Supreme Court of the District of Columbia; which court, after argument, on the 5th day of January, 1885, decreed that the administrators should recover all sums paid by Thomas L. Hume as premiums on all said policies, including those on the Virginia policy from 1874;

and that, after deducting said premiums, the residue of the money paid into court (being that received from the Maryland and the Connecticut Mutual) be paid to Mrs. Hume individually, or as guardian for herself and children; and that the Hartford Life & Annuity Company pay over to her the amount due on the certificates issued by it. From this decree the said Central National Bank, Benjamin U. Keyser, the Farmers' & Mechanics' National Bank of Georgetown, George W. Cochran, and the administrators, as well as Mrs. Hume, appealed to this court, and the cause came on to be heard here upon these cross-appeals.

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.

No appeal was prosecuted from the decree of January 4, 1883, directing the amount due upon the policy issued by the Life Insurance Company of Virginia to be paid over to Mrs. Hume for her own benefit and as guardian of her children, nor is any error now assigned to the action of the court in that regard. Indeed, it is conceded by counsel for the complainants that this contract was perfectly valid as against the world, but it is insisted that, assuming the proof to establish the insolvency of Hume in 1874 and thenceforward, the premiums paid in that and the subsequent years on this policy belonged in equity to the creditors, and that they were entitled to a decree therefor, as well as for the amount of the Maryland and Connecticut policies, and the premiums paid thereon. It is not denied that the contract of the Maryland Insurance Company was directly between that company and Mrs. Hume, and this is, in our judgment, true of that of the Connecticut Mutual, while the Hartford company's certificates were payable to her, if living.

Mr. Hume having been insolvent at the time the insurance was effected, and having paid the premiums himself, it is argued that these policies were within the provisions of 13 Eliz. c. 5, and inure to the benefit of his creditors as equivalent to transfers of property with intent to hinder, delay, and defraud. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute. In the view of the law, credit is extended in reliance upon the evidence of the ability

of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute; and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. Freeman v. Pope, L. R. 9 Eq. 206, L. R. 5 Ch. 538. The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. Cornish v. Clark, L. R. 14 Eq. 184, 189. But the rule applies only to that which the debtor could have made available for payment of his debts. For instance, the exercise of a general power of appointment might be fraudulent and void under the statute, but not the exercise of a limited or exclusive power; because, in the latter case, the debtor never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit. May, Fraud. Conv. 33. It is true that creditors can obtain relief in respect to a fraudulent conveyance where the grantor cannot, but that relief only restores the subjection of the debtor's property to the payment of his indebtedness as it existed prior to the conveyance.

A person has an insurable interest in his own life for the benefit of his estate. The contract affords no compensation to him, but to his representatives. So the creditor has an insurable interest in the debtor's life, and can protect himself accordingly, if he so chooses. Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. If the creditor insures the life of his debtor, he is thereby indemnified against

the loss of his debt by the death of the debtor before payment, yet if the creditor keeps up the premiums, and his debt is paid before the debtor's death, he may still recover upon the contract, which was valid when made, and which the insurance company is bound to pay according to its terms; but if the debtor obtains the insurance on the insurable interest of the creditor, and pays the premiums himself, and the debt is extinguished before the insurance falls in, then the proceeds would go to the estate of the debtor. Knox v. Turner, L. R. 9 Eq. 155. The wife and children have an insurable interest in the life of the husband and father, and if insurance thereon be taken out by him, and he pays the premiums and survives them, it might be reasonably claimed, in the absence of a statutory provision to the contrary, that the policy would inure to his estate. In Insurance Co. v. Palmer, 42 Conn. 60, the wife insured the life of the husband, the amount insured to be payable to her if she survived him; if not, to her children. The wife and one son died prior to the husband, the son leaving a son surviving. The court held that, under the provisions of the statute of that State, the policy being made payable to the wife and children, the children immediately took such a vested interest in the policy that the grandson was entitled to his father's share, the wife having died before the husband; but that, in the absence of the statute, "it would have been a fund in the hands of his representatives for the benefit of creditors, provided the premiums had been paid by him." So in the case of Anderson's Estate, 85 Pa. St. 202, A. insured his life in favor of his wife, who died intestate in his life-time, leaving an only child. A. died intestate and insolvent, the child surviving, and the court held that the proceeds of the policy belonged to the wife's estate, and, under the intestate laws, was to be distributed share and share alike between her child and her husband's estate, notwithstanding, under a prior statute, life insurance taken out for the wife vested in her free from the claims of the husband's creditors. But if the wife had survived she would have taken the entire proceeds.

We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death

have his personal representatives or his creditors any interest in the proceeds of such contracts, which belong to the beneficiaries, to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries; and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. Bliss, Ins. (2d ed.) 517; Glanz v. Gloeckler, 10 Ill. App. 484, per McAllister, J.; Id., 104 Ill. 573; Wilburn v. Wilburn, 83 Ind. 55; Ricker v. Insurance Co., 27 Minn. 193, 6 N. W. Rep. 771; Insurance Co. v. Brant, 47 Mo. 419; Gould v. Emerson, 99 Mass. 154; Insurance Co. v. Weitz, Id. 157.

This must ordinarily be so where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to inure by positive statutory provisions. Mrs. Hume was confessedly a contracting party to the Maryland policy; and, as to the Connecticut contracts, the statute of the state where they were made and to be performed explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children; but, if the annual premium exceed $300, the amount of such excess shall inure to the benefit of the creditors of the person paying the premiums. The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place. And if this be so as between Hume and the Connecticut companies, then he could not have at any time disposed of these policies without the consent of the beneficiary; nor is there anything to the contrary in the statutes or general public policy of the District of Columbia. It may very well be that a transfer by an insolvent of a Connecticut policy, payable to himself or his personal representatives, would be held invalid in that district, even though valid under the laws of Connecticut, if the laws of the district were opposed to the latter, because the positive laws of the domicile and the forum must prevail; but there is no such conflict of laws in this case, in respect to the power

of disposition by a person procuring insurance payable to another.

The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts. Thus in Elliott's Appeal, 50 Pa. St. 75, 83, where the policies were issued in the name of the husband, and payable to himself or his personal representatives, and while he was insolvent were by him transferred to trustees for his wife's benefit, the Supreme Court of Pennsylvania, while holding such transfers void as against creditors, say: "We are to be understood in thus deciding this case that we do not mean to extend it to policies effected without fraud, directly and on their face for the benefit of the wife, and payable to her; such policies are not fraudulent as to creditors, and are not touched by this decision." In the use of the words "without fraud," the court evidently means actual fraud participated in by all parties, and not fraud inferred from the mere fact of insolvency; and, at all events, in McCutcheon's Appeal, 99 Pa. St. 133, 137, the court say, referring to Elliott's Appeal: "The policies in that case were effected in the name of the husband, and by him transferred to a trustee for his wife at a time when he was totally insolvent. They were held to be valuable choses in action, the property of the assured, liable to the payment of his debts, and hence their voluntary assignment operated in fraud of creditors, and was void as against them under the statute of 13 Eliz. Here, however, the policy was effected in the name of the wife, and in point of fact was given under an agreement for the surrender of a previous policy for the same amount, also issued in the wife's name. * * * The question of good faith or fraud only arises in the latter case; that is, when the title of the beneficiary arises by assignment. When it exists by force of an original issue in the name or for the benefit of the beneficiary, the title is good, notwithstanding the claims of creditors. * * * There is no anomaly in this, nor any conflict with the letter or spirit of the statute of Elizabeth, because in such cases the policy would be at no time the property of the assured, and hence no question of fraud in its transfer could arise as to his creditors. It is only in case of the assignment of a policy that *once belonged* to the assured that the ques-

tion of fraud can arise under this act." And see Bank v. Insurance Co., 24 Fed. Rep. 770; Pence v. Makepeace, 65 Ind. 345, 347; Succession of Hearing, 26 La. Ann. 326; Stigler's Ex'r v. Stigler, 77 Va. 163; Thompson v. Cundiff, 11 Bush. 567.

Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. This seems to have been the view of the court below, for the decree awarded to the complainants the premiums paid to the Virginia Company from 1874 to 1881, inclusive, and to the other companies from the date of the respective policies; amounting, with interest, to January 4, 1883, to the sum of $2,696.10, which sum was directed to be paid to Hume's administrators out of the money which had been paid into court by the Maryland and Connecticut Mutual Companies. But, even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated.

Were the creditors, then, entitled to recover the premiums? These premiums were paid by Hume to the insurance companies, and to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here. The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground.

Mrs. Hume is not shown to have known of or suspected her husband's insolvency, and if the payments were made at her instance, or with her knowledge and assent, or if, without her knowledge, she afterwards ratified the act, and claimed the benefit, as she might rightfully do, (Thompson v. Ins. Co., 46 N. Y. 675,) and as she does, (and the same remarks apply to the children,) then has she thereby received money which *ex æquo et bono* she ought to return to her husband's creditors; and can the decree against her be sustained on that ground? If in some cases payments of premiums might be treated as gifts inhibited by the statute of Elizabeth, can they be so treated here?

It is assumed by complainants that the money paid was derived from Hume himself, and it is therefore argued that to that extent his means for payment of debts were impaired. That the payments contributed in any appreciable way to Hume's insolvency, is not contended. So far as premiums were paid in 1880 and 1881, (the payments prior to those years having been the annual sum of $196.18 on the Virginia policy,) we are satisfied from the evidence that Hume received from Mrs. Pickrell, his wife's mother, for the benefit of Mrs. Hume and her family, an amount of money largely in excess of these payments, after deducting what was returned to Mrs. Pickrell; and that, in paying the premiums upon procuring the policies in the Maryland and the Connecticut Mutual, Hume was appropriating to that purpose a part of the money which he considered he thus held in trust; and we think that, as between Hume's creditors and Mrs. Hume, the money placed in Hume's hands for his wife's benefit is, under the evidence, equitably as much to be accounted for to her by Hume, and so by them, as is the money paid on her account to be accounted for by her to him or them. We do not, however, dwell particularly upon this, nor pause to discuss the bearing of the laws of the states of the insurance companies upon this matter of the payment of premiums by the debtor himself, so far as they may differ from the rule which may prevail in the District of Columbia, in the absence of specific statutory enactment upon that subject, because we prefer to place our decision upon broader grounds.

In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence

of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible. But the circumstances of each particular case should be considered, as in Partridge v. Gopp, 1 Eden, 163, 168, Amb. 596, 599, where the Lord Keeper, while holding that debts must be paid before gifts are made, and debtors must be just before they are generous, admitted that "the fraudulent intent is to be collected from the magnitude and value of the gift." Where fraud is to be imputed, or the imputation of fraud repelled, by an examination into the circumstances under which a gift is made to those towards whom the donor is under natural obligation, the test is said, in Kiff v. Hanna, 2 Bland, 33, to be the pecuniary ability of the donor at that time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment; and, in considering the sufficiency of the debtor's property for the payment of debts, the probable, immediate, unavoidable, and reasonable demands for the support of the family of the donor should be taken into the account and deducted, having in mind also the nature of his business and his necessary expenses. Emerson v. Bemis, 69 Ill. 541. This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be, lawfully obtained, at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered.

The decree is affirmed, except so far as it directs the payment to the administrators of the premiums in question and interest, and, as to that, is reversed, and the cause remanded to the

court below, with directions to proceed in conformity with this opinion.[10]

FIRST NAT. BANK OF HUMBOLDT, NEB., v. GLASS et al.

79 Fed. 706, 25 C. C. A. 151

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897)

Appeal from the Circuit Court of the United States for the District of Kansas.

This appeal challenges a decree which sustained a demurrer to a bill brought by a judgment debtor to subject a homestead, which the debtor had bought and caused to be conveyed to his wife, to the payment of the judgment. The bill disclosed these facts: The statutes of Nebraska exempt from judicial sale a homestead not exceeding in value $2,000, consisting of a dwelling house in which the claimant resides and the land on which the house is situated, not exceeding 160 acres in extent. Consol. St. Neb. 1891, c. 19, p. 430. The constitution of the state of Kansas exempts from forced sale under process of law a homestead not exceeding 160 acres of farming land, or one acre within the limits of an incorporated town or city, and all the improvements thereon, when it is occupied as a residence by the family of the owner, whatever its value may be. Const. Kan. art. 15, § 9; 1 Gen. St. 1889, par. 235. From May 4, 1892, until March 22, 1894, the appellee, John F. Glass, owned, and with his wife, Harriet H. Glass, resided upon and occupied, 160 acres of land in the state of Nebraska, as their homestead. In May, 1892, Glass purchased of one Gravatte some fruit trees which were planted on his farm, and which enhanced its value $3,000. He gave Gravatte a span of horses and six of his promissory notes for these trees. The appellant, the First National Bank of Humboldt, Neb., purchased four of these notes before their maturity, and on November 19, 1894, obtained a judgment thereon for $2,278.44 against John F. Glass, in an action which

10—*Cf.* The Merchants' and Miners' Transportation Co. v. Borland, 53 N. J. Eq. 282.

See article in 25 Am. L. Rev. 185, where the cases and statutes are discussed.

As to amount recoverable by creditors in case transaction is declared fraudulent see Roberts v. Winton, 100 Tenn. 484; Bailey v. Wood, 202 Mass. 549; Lehman v. Gunn, 124 Ala. 213; Asbury Park First Nat. Bank v. White, 60 N. J. Eq. 487, 46 Atl. 1092.

it had commenced in the District Court of Pawnee county, in the state of Nebraska, on June 24, 1893. Glass was insolvent, and he had no property except the farm which he occupied as his homestead. On March 22, 1894, he sold and conveyed this farm to one Huff for $6,100, and with that money he bought 160 acres of farming land in Franklin county in the state of Kansas, and caused the vendor to convey it to his wife. He and his wife immediately took possession of it, and have ever since resided upon, occupied, and claimed it as their homestead. The bank caused an execution to be issued on its judgment in 1895, and it was returned nulla bona. It then brought an action upon this judgment, and obtained a judgment in that action, and a return of execution unsatisfied, in the District Court of Franklin county, in the state of Kansas. Thereupon it exhibited its bill in the court below, and alleged, in addition to the foregoing facts, that the appellees sold their farm in Nebraska, secretly fled to the state of Kansas, and purchased and took possession of their farm in that state with the intent and for the purpose of cheating and defrauding the bank out of its claim against Glass, and for the purpose of preventing it from collecting its judgment from the farm in Nebraska, which was worth $4,100 more than the value of an exempt homestead, under the statutes of that state. The bank prayed for the sale of the farm in Kansas, and for the application of the proceeds of the sale to the payment of its judgment.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

An insolvent debtor may use with impunity any of his property that is free from the liens and the vested equitable interests of his creditors to purchase a homestead for himself and his family in his own name. If he takes property that is not exempt from judicial sale and applies it to this purpose, he merely avails himself of a plain provision of the constitution or the statute enacted for the benefit of himself and his family. He takes nothing from his creditors by this action in which they have any vested right. The constitution or statute exempting the homestead from the judgments of creditors is in force when they extend the credit to him, and they do so in the face of the fact that he has this right. Nor can the use of property that is not exempt from execution to procure a homestead be held to be a fraud upon the creditors of an insolvent debtor,

because that which the law expressly sanctions and permits cannot be a legal fraud. Jacoby v. Distilling Co., 41 Minn. 227, 43 N. W. 52; Kelly v. Sparks, 54 Fed. 70; Sproul v. Bank, 22 Kan. 238; Tucker v. Drake, 11 Allen, 145; O'Donnell v. Segar, 25 Mich. 367; North v. Shearn, 15 Tex. 174; Cipperly v. Rhodes, 53 Ill. 346; Randall v. Buffington, 10 Cal. 491. When the appelles sold their farm in Nebraska, and bought and took possession of their homestead in Kansas, the bank had acquired no lien and no specific equitable interest in any of the property of its debtor. It was his simple contract creditor, and it had no vested right in either his property or his residence. He had the right to change his residence from one state to another, and to secure for himself a homestead in any state where he chose to live. If, therefore, he had taken the conveyance of his homestead in Kansas in his own name, it would have been exempt from the judgment of the appellant.[11]

The only question remaining is whether the farm lost this exemption because he caused it to be conveyed to his wife. Upon this question the authorities are not in accord. The Supreme Court of Minnesota declares that such a transaction is a fraud upon creditors, and subjects the property so acquired to the payment of their debts. Sumner v. Sawtelle, 8 Minn. 309 (Gil. 272); Rogers v. McCauley, 22 Minn. 384. The Supreme Court of Kansas, on the other hand, holds that a homestead purchased and paid for from the unexempt property of the husband is equally exempt from judicial sale, under the constitution of that state, whether the title is taken in the name of the husband or in that of the wife. Monroe v. May, 9 Kan. 466, 475, 476; Hixon v. George, 18 Kan. 253, 258. The decisions of the highest judicial tribunal of the state of Kansas, which we have cited, settle this question in the case at bar. * * * The decree below is in accordance with the constitution and statutes of the state of Kansas, as they have been construed by its supreme court, the property in controversy is situated in that state, and its title is fixed by that construction. Let the decree be affirmed, with costs.[12]

11—To same effect is In re Wilson, 123 Fed. 20, reviewing earlier cases *contra*. See also Ferguson v. Little Rock Trust Co., 99 Ark. 45, 137 S. W. 555 Ann. Cas. 1913 A, 960 and note wherein many cases are collected.

12—As to creditor's possible remedy, see Riddell v. Shirley, 5 Cal. 488; Comstock v. Bechtel, 63 Wis. 656, 24 N. W. 465.

Fraudulent Conveyance of Exempt Property.—"This case was determined by the court below in

TWYNE'S CASE

3 Coke, 80 b.

(Star Chamber, 1602)

In an information by Coke, the Queen's Attorney General, against Twyne of Hampshire, in the Star Chamber, for making and publishing of a fraudulent gift of goods: the case on the stat. 13 Eliz. c. 5 was such; Pierce was indebted to Twyne in four hundred pounds, and was indebted also to C. in two hundred pounds. C. brought an action of debt against Pierce, and pending the writ, Pierce being possessed of goods and chattels of the value of three hundred pounds, in secret made a general deed of gift of all his goods and chattels real and per-

accordance with what has been generally understood to be the tendency and logical result of Piper v. Johnston, 12 Minn. 60, and before the decisions of this court in Morrison v. Abbott, 27 Minn. 116; Ferguson v. Kumler, Id. 156; and Furman v. Tenney, *ante*, p. 77, were promulgated. So far as this Court is concerned, the latter cases establish the rule that a debtor's transfer of property exempt from execution is not void, but valid, even against his creditors, though the transfer be voluntary. It is, of course, no less valid if made upon a consideration." Berry, J., in Baldwin v. Rogers, 28 Minn. 544, 548.

"There is no principle of law more consonant with reason, or better supported by authority, than that a conveyance which is fraudulent as to creditors, binds, nevertheless, the parties to it. Through that 'cloud of authorities' of which the counsel speak; this principle shines perpetually, and it guides us to the conclusion that the appellant is here without merits.

"Having caused his house and lot to be conveyed to his wife for the purpose of hindering and delaying his creditors, denying his ownership as long as denial would serve to keep them off, he chops round now when they have raised $314.26 out of the property by a sheriff's sale of it, and claims $300 of the proceeds under our exemption statute.

"It would be a perversion of that humane law to apply it to such a case. As to his creditors, the fraudulent deed was void, and he remained the owner of the property, but the deed concluded him for all other purposes. The statute was not made as an instrument of fraud to delay and hinder creditors, but to secure to honest debtors from the wreck of their fortunes a subsistence until they can do something for themselves and families." Woodward, J., in Huey's Appeal, 29 Pa. St. 219, 220. For the cases generally, see 20 Cyc. 377, *et seq.*

Property of Little or No Value.— Compare French v. Holmes, 67 Me. 186, with Garrison v. Monaghan, 33 Pa. St. 232. See dissenting opinion in Aultman, etc., Co. v. Pikop, 56 Minn. 531. See also Williams v. Robbins, 15 Gray, 590.

sonal whatsoever to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shore the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a *fieri facias* directed to the sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by the command of the said Twyne, did with force resist the said sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift on the whole matter, was fraudulent and of no effect by the said Act of 13 Eliz. or not, was the question. And it was resolved by Sir Thomas Egerton, Lord Keeper of the Great Seal, and by the Chief Justice Popham and Anderson, and the whole Court of Star Chamber, that this gift was fraudulent, within the statute of 13 Eliz. And in this case divers points were resolved:

1st. That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or anything of necessity; for it is commonly said, *quod dolus versatur in generalibus.*

2nd. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3rd. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

4th. It was made pending the writ.

5th. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

6th. The deed contains, that the gift was made honestly, truly, and *bona fide; et clausulæ inconsuet' inducunt suspicionem.*

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said Act of 13 Eliz. by which it is provided, that the said Act shall not extend to any estate or interest in lands, etc., goods or chattels made on a good consideration and *bona fide;* for although it is on a true and good consideration, yet it is not *bona fide,* for no gift shall be deemed to be *bona fide* within the said proviso which is accom-

panied with any trust; as if a man be indebted to five several persons, in the several sums of twenty pounds, and hath goods of the value of twenty pounds, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bona fide* within the said proviso; for the proviso saith on a good consideration, and *bona fide;* so a good consideration doth not suffice, if it be not also *bona fide;* and therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. 2nd, Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3rd, Immediately after the gift, take the possession of them; for continuance of the possession in the donor, is a sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bona fide,* do not extend to every gift made *bona fide;* and therefore there are two manners of gifts on a good consideration, *scil.* consideration of nature or blood, and a valuable consideration. As to the first, in the case before put; if he who is indebted to five several persons, to each party in twenty pounds, in consideration of natural affection, gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, etc., which are things of value, the intent of the Act was, that the consideration in such case should be valuable; for equity requires, that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed, that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors; and if consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to gifts made *bona fide,* it is to be known, that every gift made *bona fide,* either is on a trust between the parties, or without any trust; every gift made on a trust is out of this proviso; for that which

is betwixt the donor and donee, called a trust *per nomen speciosum,* is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed, or implied; an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed; a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature, or blood only; and therefore, if a man before the stat. of 27 H. 8 had bargained his land for a valuable consideration to one and his heirs, by which he was seized to the use of the bargainee; and afterwards the bargainor, without a consideration, infeoffed others, who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seized to the use of the bargainee; so in the same case, if the feoffees, in consideration of nature, or bloode had without a valuable consideration enfeoffed their sons, or any of their blood who, had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration but shall toll an use raised on consideration of nature, for both considerations are in *æquali jure,* and of one and the same nature.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.* that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him, *vide* 33 H. 6, 33, by Prisot, if the father enfeoffs his son and heir apparent within age *bona fide,* yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bona fide* is a gift made without any trust either expressed or implied: by which it appears, that as a gift made on a good consideration, if it be not also *bona fide,* is not within the proviso; so a gift made *bona fide,* if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also *bona fide.*

To one who marvelled what should be the reason that Acts and statutes are continually made at every Parliament without intermission, and without end; a wise man made a good and short answer, both of which are well composed in verse.

Quaeritur, ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made. * * *

CADOGAN v. KENNETT

2 Cowp. 432

(King's Bench. May 6, 1776)

Upon shewing cause why a new trial should not be granted in this case, Lord MANSFIELD reported as follows:

This was an action of trover brought by the plaintiffs, who are the trustees under the marriage settlement of Lord Montfort, against the defendant Mr. Kennett, who is a judgment creditor of Lord Montfort's, and the other defendants, who are sheriff's officers, to recover certain goods taken by them in execution under a fi. fa.—At the trial the plaintiffs proved Lord Montfort's marriage settlement, by which it appeared that the goods in question, which were the household goods belonging to Lord Montfort, at his lordship's house in town, and which were very minutely particularized in a schedule annexed to the settlement, were all conveyed to the plaintiffs, as *trustees*, for the use of Lord Montfort for life, remainder to Lady Montfort for her life, remainder to the first and other sons of the marriage in strict settlement.

One of the witnesses proved, that at the time of the settlement being made, it was known Lord Montfort was in debt:—but he thought the fortune of the lady he was to marry, which amounted to £10,000 was amply sufficient to pay all the debts he owed at that time, and had no idea of disappointing any creditor. That Mr. Kennett was a *creditor* of Lord Montfort *at the time of the settlement*. That Lady Montfort was a ward of the Court of Chancery; and the reason for including the household goods in the settlement was, because it was thought Lord Montfort's real estate was not of itself sufficient to make a proper and adequate settlement.—It appeared also that the

settlement was referred to a Master in Chancery, who approved of the settlement, and the inserting the household goods for the reason above-mentioned.

At the trial, I inclined to think, that the settlement being made under a treaty with the Court of Chancery, and approved of by the Master, was a *bona fide* transaction, and that the *possession* of Lord Montfort was *not fraudulent,* because it was in *pursuance,* and in *execution,* of the *trust.*

The jury found a verdict for the plaintiffs, damages 1s. and if the court should be of opinion with the plaintiffs, then the goods were to be delivered specifically.

LORD MANSFIELD.—The question in this case is, whether the plaintiffs, who are trustees under the marriage settlement of Lord Montfort, by which the household goods in question are settled as heir looms with the house in strict settlement, and specifically enumerated in a schedule annexed to the settlement, so as to avoid any fraud by the addition or purchase of new; whether, the trustees are entitled to the possession of these goods against the defendant Mr. Kennett.

The defendant has taken the goods in execution; and it is not disputed that he is a fair creditor. But the plaintiffs bring this action as trustees under the marriage settlement, and the question is, whether they are, against the defendant, entitled to the possession of these goods for the purposes of the trust. I have thought much of this case since the trial, and in every light in which I have considered it, I have not been able to raise a doubt.

The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 El. c. 5, and 27 El. c. 4. The former of these statutes relates to *creditors* only; the latter to *purchasers.* These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud.

The stat. 13 El. c. 5, which relates to frauds against creditors, directs "that no act whatever done to defraud a creditor or creditors shall be of any effect against such creditor or creditors." But then such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore, the statute does not militate against any transaction *bona fide,* and where there is no imagination of fraud. And so is the

common law. But if the transaction be not *bona fide,* the circumstances of its being done for a *valuable consideration,* will not *alone* take it out of the statute. I have known several cases where persons have given a fair and *full price* for goods, and where the *possession* was *actually changed;* yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void.

One case was, where there had been a decree in the Court of Chancery, and a sequestration. A person with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them. The court said, the purchase being with a manifest view to defeat the creditor, was fraudulent, and therefore, notwithstanding a valuable consideration, void. So, if a man knows of a judgment and execution, and, with a view to defeat it, purchases the debtor's goods, it is void: *because,* the purpose is *iniquitous.* It is assisting one man to cheat another, which the law will never allow. There are many things which are considered as circumstances of fraud. The statute says not a word about *possession.* But the law says, if after a sale of goods, the vendee continue in possession, and appear as the *visible* owner, it is evidence of fraud; because goods pass by delivery: but it is not so in the case of a lease, for that does not pass by delivery.

The stat. 27 El. c. 4, does not go to *voluntary* conveyances *merely* as *voluntary,* but to such as are *fraudulent.* A fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The question, therefore, in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors. If there be a conveyance to a trustee for the benefit of the debtor, it is fraudulent. The question then is, whether this settlement is of that sort. It is a settlement which is very common in great families. In *wills* of great estates, nothing is so frequent as devises of part of the *personal estate* to go as *heir looms;* for instance, the devise of the Duke of Bridgewater's library.—the old Duke of Newcastle's plate. So in marriage settlements, it is very common for libraries and plate to be thus settled, and for chattels and leases to go along with the land. If the husband grows extravagant, there never was an idea that these could

afterwards be overturned. If this court were to determine they should, the parties would resort to Chancery.—We come then to the circumstances of the present case, which are very strong. There is not a suggestion of any intention to defraud, or the most distant view of disappointing any creditor. The very object of the marriage settlement was, that the lady's fortune might be applied to the discharge of all Lord Montfort's debts: the amount of this fortune was £10,000 and was thought fully sufficient for that purpose. Besides this, it is a settlement approved by a Master in Chancery. Most clearly the Master in Chancery and the Great Seal could have no fraudulent view. But it appears further, that the reason why the goods were inserted was, because the settlement of the real estate alone was thought inadequate without them. Clearly, therefore, it was no contrivance to defeat creditors, but meant as a provision for the lady if she survived, and heir looms for the eldest son.

An argument, however, is drawn from the *possession*, as a strong circumstance of fraud: but it does not hold in this case. It is a *part* of the *trust* that the goods shall continue in the house; and for a very obvious reason: because, the furniture of one house will not suit another; and it was the business of the trustee to see the goods were not removed.

If Lord Montfort had let his house with the furniture, reserving one rent for the house, and another for the furniture; or if the rent could be apportioned, the creditors would be entitled to the rent; but they have no right to take the goods themselves: the possession of them belongs to the trustees, and the absolute property of them is now vested in the eldest son.

I expected an authority; but though such settlements are frequent, no case has been cited to shew they are fraudulent. How common are settlements of chattels, and money in the stocks; can there be a doubt but they are good? Yet the creditors would be entitled to the dividends during the interest of the debtor. Here, there was clearly no intention to defraud, and there is a good consideration. Therefore, I am of opinion it could not be left to the jury to find the settlement fraudulent, merely because there were creditors. The goods must now be kept in the house for the benefit of the son.

ASTON, Justice. I am of the same opinion.

WILLES, Justice. I am of the same opinion.

Per Cur. Rule for a new trial discharged.

MEUX v. HOWELL

4 East 1

(King's Bench. June 13, 1803)

This was an action on the statute 13 Eliz. c. 5, wherein the declaration stated, that the defendants of their malice, fraud, covin, and collusion, on the 10th of June, 1802, at, etc., were parties to a certain feigned, covenous, and fraudulent suit against one J. Norton, in which a certain feigned, covenous, and fraudulent judgment against him, to which the defendants were also parties, was signed and entered of record in B. R. as of Easter term, 42 Geo. 3; by which said judgment the defendants feignedly, covenously, and fraudulently recovered against the said J. N. as well a supposed debt of £800, as also 63s. damages, etc., to the purpose and intent to delay, hinder, and defraud the plaintiffs of their just debt, the plaintiffs then being creditors of the said J. N. for a debt of £176, etc.; which said feigned, covenous, and fraudulent judgment, the defendants being parties and privies to, and knowing of the same, afterwards, on 12th June, 1802, at, etc., did wittingly and willingly put in use, avow, maintain, and defend as true, simple, *bona fide*, and upon good consideration, contrary to the form of the statute, etc.; by reason whereof an action hath accrued to the plaintiffs, they being the parties aggrieved, etc., to demand £803 3s. being so much contained in the said feigned, covenous, and fraudulent judgment, etc. Plea, *nil debet*.

At the trial before Lord Ellenborough, C. J., at the sittings after last Hilary term, at Westminster, the plaintiff recovered a verdict upon the first count of the declaration above stated; and upon a rule *nisi* obtained in the last term for setting aside the verdict and entering a nonsuit, or arresting the judgment, which stood over till now, the following facts appeared.

The plaintiffs were brewers, and landlords of a public house tenanted by J. Norton, who was indebted to them £92 10s. for three years' rent in arrear, and also £116 for beer supplied to him by the plaintiffs. On the 11th of May, 1802, the plaintiffs distrained for the £92 10s. rent in arrear, and an agent was put in possession of the goods distrained on the premises, but no sale was made, Norton applying to them for time to settle his affairs, and agreeing that the plaintiffs' agent should continue in possession of the distress in the mean time. Prior to the

sending in the distress Norton was arrested by the defendants, who were distillers, for £42, for which he had at first given bail, but on the 12th of May was rendered in discharge of his bail. On the 19th of May, Norton having agreed to dispose of his business to one J. W., while the plaintiffs' distress still continued, entered into an agreement in writing with the plaintiffs' agent Deady, whereby he requested him to let J. W. into possession of his (Norton's) house for £30 goodwill, and to sell by appraisement all the goods, fixtures, and stock in trade on the premises to J. W. before the 24th of May, and after such settlement Deady was to pay all the rent, taxes, expenses, and the book debt due to Meux and Co., and another debt to him, (Deady) and another to his brother; the overplus to be returned to Norton, etc. In consequence of this authority Deady procured the goods, etc., to be appraised, and the gross amount was £236 7s. 3d., out of which certain deductions were to be made for taxes, expenses, etc. The defendants being apprised by Norton of these circumstances, on the 25th of May, while the plaintiffs' agent was still in possession under the distress, the defendant Atlee told Norton that he should be very sorry that Deady should run away with the whole of the property, and that if he (Norton) would consent to sign an instrument, he would give him his discharge immediately. What the instrument was Norton did not know till he had signed it; but Atlee proposed that it should be for the benefit of the creditors in general. Norton did not himself consult any of his creditors, of whom he had several, but left that to Atlee. Norton, however, swore that he did not sign the instrument for the purpose of defeating the plaintiffs' distress; and at the time of the trial he was still in custody at the suit of the defendants. This instrument, which was prepared by Mr. Wild, the attorney for the defendants, was a warrant of attorney to confess judgment for £800, with a defeazance that execution should issue to levy £500 (which the defendants' attorney computed to be the probable amount of the debts), and that with the produce of the sale an equal distribution should be made amongst all the creditors. Under this power judgment was entered up on the 10th of June, and execution issued on the 12th, when all the goods were sold for about £104, and no part of the money was paid to the plaintiffs either on account of their distress for the rent, in respect of which the plaintiffs' agent was still on the premises, with Norton's consent, or for their book debt: but

a tender was made to the plaintiffs as for the rent (but less than the two years' rent), which they would not receive. The defendants had not previously consulted any of the other creditors of Norton; but Atlee, in answer to one of them who afterwards called upon him, said, that he meant to divide the money equally amongst the creditors as soon as he could procure a list of them. On the part of the defendants, Mr. Wild their attorney swore, that the instructions he received from them was merely to take such measures as the occasion required to effect an equal distribution of Norton's property amongst all his creditors, leaving the particular mode of doing it to him (Wild); in consequence of which he prepared the warrant of attorney on which the judgment in question was entered up. The defeazance was taken for £500, considering that to be about the amount of Norton's debts altogether. It was left to the jury to consider whether the defendants were privy to the actual judgment and execution, founded upon the power of attorney prepared by Wild their agent, or merely to the general object of obtaining possession of the property to prevent the plaintiffs from satisfying their demand in prejudice to the general creditors. The jury found, that the defendants were privy to the means used as well as to the general object, and found a verdict for the plaintiffs for £803 3s.

LORD ELLENBOROUGH, C. J. It is not every feoffment, judgment, etc., which will have the effect of delaying or hindering creditors of their debts, etc., that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors: every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, etc., must be devised of malice, fraud, or the like, to bring it within the statute. Then was this judgment of that sort? For whose benefit was the fraud? Norton has extinguished no debt by means of it, further than as the execution shall turn out productive in satisfying the demands of his just creditors. It holds out no protection to him otherwise. He is even left under arrest at the suit of the particular creditor, as he was before the judgment was confessed. Then how are the defendants implicated in any fraud? Instead of having, as they might have had, a satisfaction for their whole debt, by having

the judgment confessed to them for that alone, they forego that advantage, and take a judgment confessed for the amount of the debts of the creditors at large, being contented to come in *pari passu* with the other creditors. They have derived therefore no benefit to themselves. Nor was the judgment confessed in prejudice of any right of the plaintiffs. For their distress which was in could not be defeated by the operation of the judgment. And as to their book debt, they had taken no inchoate legal steps to recover it, for the paper signed by Norton operated nothing. The judgment put the plaintiffs in the same situation as the rest of the creditors. It delayed the plaintiffs indeed so far as a proportionable payment to creditors in general is a delay of each of them in particular: but there was no fraud, no colour, no undue protection to the debtor. The defendants were placed in a worse situation than if they had taken the judgment for themselves alone. Therefore unless we were to go the length of saying that every assignment to a creditor is fraudulent as to the rest of the creditors, and prohibited to be made, this was not fraudulent. It has none of the qualities of fraud within the act of parliament, which was meant to prevent deeds, etc., fraudulent in their concoction, and not merely such as in their effect might delay or hinder other creditors.

GROSE, J. The statute in its whole frame is calculated to prevent certain frauds, and to punish those who are guilty of them; and we must be satisfied that the defendants have been so guilty before we can say that the verdict ought to stand, which is to induce that punishment upon them. The first clause of the statute speaks of judgments, etc., devised of "malice, fraud, covin, collusion, or guile," not only to "the let or hindrance of the due course and execution of law and justice," but also to "the overthrow of all true and plain dealing." The second clause speaks of persons whose suits, debts, etc., are hindered, delayed, or defrauded "by such guileful, covenous, or fraudulent devices and practices as aforesaid." And the third section inflicts punishment upon such as put in ure, etc., "as true, simple and done *bona fide* and upon good consideration," such acts. This satisfies me that if the judgment, etc., be given *bona fide* and upon good consideration, it is not within the act. Here there is nothing like a fraud. And it makes one shudder to think that persons who appear like the defendants to have acted most honestly should have been in any hazard of being

subjected to punishment for having endeavoured to procure an equal distribution of their debtors' effects amongst all his creditors. Their conduct was meritorious, and the judgment confessed by Norton was not covenous or feigned, but given *bona fide* and upon good consideration for debts due to the defendants and the other creditors. Therefore, I think there ought to be a new trial.

Lord ELLENBOROUGH, C. J., then observed, that he thought the third clause of the act imposing the penalty, which in one part only mentions the word *bond,* had had a fair construction put upon it by the plaintiffs' counsel; and that it must be taken to extend to feoffments, judgments, etc., as mentioned in the other parts of the clause.

LAWRENCE, and LE BLANC, Justices, declared themselves of the same opinion for the defendants.

Rule absolute.

FREEMAN v. POPE

5 Ch. App. 538

(Chancery. June 7, 1870)

This was an appeal by the Defendant Pope from a decree of Vice-Chancellor James, setting aside a voluntary settlement, dated the 3d of March, 1863, by which the Rev. J. Custance assigned to trustees for the benefit of Julia Pope (then Julia Thrift) a policy of insurance for £1000 (effected by him in 1845 on his own life), and covenanted to pay the premiums. It appeared that he had previously settled this policy upon her in 1853, reserving a power of revocation, which he exercised in 1861, in order that he might receive a bonus.

At the time when the settlement now impeached was made, the settlor held two livings producing a net income of £815, and he was entitled to a Government life-annuity of a little more than £180, and to a copyhold cottage which he on the same day covenanted to surrender to Mrs. Walpole, the mother of Julia Pope, for £50. He had no other property except his furniture, and he was being pressed by his creditors. Among other debts, he owed £489 to Messrs. Gurney, his bankers at Norwich, and £7 8s. 6d. to a postmaster. On the same 3d of March, 1863, he

borrowed from Mrs. Walpole £350, for which he gave her a bill of sale of his furniture. Mrs. Walpole was privy to, and one of the trustees of, the settlement. At the same time he made an arrangement with his bankers that his solicitor, Mr. Copeman, should receive certain income from the benefices, and pay out of it £50 each half-year towards discharge of the balance. The banking account at Norwich was to remain a dead account, and to be discharged, with interest, by the above instalments. A new account was to be opened with the Aylsham branch of the same bank, and Copeman was to pay the residue of the income (after deducting the £50) to this new account, which was to be an ordinary current banking account.

At the testator's death, in April, 1868, the balance of £489 due to the bankers had been reduced to £117 by means of the annual instalments of £50. The Aylsham account showed no balance on either side. The postmaster's debt of £7 8s. 6d., and Mrs. Walpole's £350, with an arrear of interest, remained unpaid. The other debts due at the date of the settlement had been paid. The settlor, however, owed many debts subsequently contracted, and there were no assets whatever to pay them; the furniture having been sold under a subsequent bill of sale, to which Mrs. Walpole had agreed to postpone her security.

The Plaintiff, a tradesman who had supplied goods to the settlor after the date of the settlement, filed his bill for administration of the settlor's estate, and to set aside the settlement, to the benefit of which the Defendant Pope had become entitled under an appointment by Julia Pope.

The Vice-Chancellor James made a decree for setting aside the settlement, from which Pope appealed.

LORD HATHERLEY, L. C. The principle on which the statute of 13 Eliz. c. 5, proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made.

The difficulty the Vice-Chancellor seems to have felt in this case, was, that if he, as a special juryman, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder, or delay his creditors, he should have come to the conclusion that he had no such intention. With great deference to the view of the Vice-Chancellor, and with all the respect which I most unfeignedly entertain for his judgment, it appears to me that this does not put the

question exactly on the right ground; for it would never be left to a special jury to find, *simpliciter*, whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the Judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so. A jury would undoubtedly be so directed, lest they should fall into the error of speculating as what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case. Of course there may be cases —of which Spirett v. Willows, 3 D. J. & S. 293, is an instance— in which there is direct and positive evidence of an intention to defraud, independently of the consequences which may have followed, or which might have been expected to follow, from the act. In Spirett v. Willows the settlor, being solvent at the time, but having contracted a considerable debt, which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.

The circumstances of the present case are these: The settlor was pressed by his creditors on the 3d of March, 1863. He was a clergyman with a very good income, but a life income only. He had a life-annuity of between £180 and £190 a year, and besides that he had an income from his benefice—his income from the two sources amounting to about £1,000 a year. But at the same time his creditors were pressing him, and he had to

borrow from Mrs. Walpole, who lived with him as his housekeeper, a sum of £350 wherewith to pay the pressing creditors. That accordingly was done, and he handed over to her as security the only property he had in the world beyond his life income and the policy which is now in question, namely, his furniture, and a copyhold of trifling value. It is said, however, that the value of the furniture exceeded (and I will take it to be so) by about £200 the value of the debt which was secured to Mrs. Walpole. That debt may be put out of consideration, not only on that account, but because Mrs. Walpole, being herself a trustee of the settlement which is impeached, cannot be heard to complain of that settlement. But he also owed at the time of this pressure a debt of £339 to his bankers at Norwich, and he required for the purpose of clearing the pressing demands upon him, not only the sum which he borrowed from Mrs. Walpole, but an additional sum of £150, which sum the bankers agreed to furnish, making their debt altogether, at the date of the execution of this settlement, a debt of £489. They made with him an arrangement (which probably intended, in a great measure, as a friendly act towards a gentleman who was seventy-three years of age, and the duration of whose life, therefore, could not be expected to be very long), that they would for the present (for it cannot be held to be more than a present arrangement) suspend the proceedings, which, it appears, they were contemplating, upon his allowing his solicitor to receive part of his income, pay £100 a year towards liquidating the £489 (which was to be carried to what is called a "dead account") and pay the residue into their branch bank at Aylsham, to an account upon which the settlor might draw. That arrangement was made, but there was no bargain on the part of the bankers that they would not sue at any time they thought fit; and, on the other hand, they had nothing in the shape of security for the payment of their debt, for they had not taken out sequestration, and there could be nothing in the shape of a charge upon the living except through the medium of a sequestration. When the settlor had made the voluntary assignment of the policy, he stood in this position, that he had literally nothing wherewithal to pay or to give security for the debt of £489, except the surplus value of the furniture, which must be taken to be worth about £200, and he was clearly and completely insolvent the moment he had executed the settlement, even if we assume that some portion of his tithes and of the annuity was due to him.

It appears that a payment of the tithes was made in January, and we cannot suppose that there was more owing to him than the £200 which was paid in May, two months after the date of the deed; and if we add to that £200 as the surplus value of the furniture, and add something for an apportioned part of the annuity, the whole put together would not meet the £489. He, in truth, was at that time insolvent; and there I put it more favourably than I ought to put it, because he could not at once put his hands upon that sum, so as to apply it towards satisfying the debt, at any time between March and May. The case, therefore, is one of those where an intention to delay creditors is to be assumed from the act.

The Vice-Chancellor seems to have felt himself very much pressed by the case of Spirett v. Willows, 3 D. J. & S. 293, 302, and the *dicta* of Lord Westbury in that case. The first of those *dicta* is: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." The Vice-Chancellor seems to have thought himself bound by this expression of opinion, and to have set aside the settlement upon that ground alone. It is clear, however, that this expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of the case before him, where the settlor was guilty of a plain and manifest fraud. It is expressed in very large terms, probably too large; but at all events, it is unnecessary to resort to it in the present case. It seems to me that the difficulty felt by the Vice-Chancellor arose from his thinking that it was necessary to prove an actual intention to delay creditors, where the facts are such as to show that the necessary consequence of what was done was to delay them. If we had to decide the question of actual intention, probably we might conclude that the settlor, when he made the settlement, was not thinking about his creditors at all, but was only thinking of the lady whom he wished to benefit; and that his whole mind being given up to considerations of generosity and kindness towards her, he forgot that his creditors had higher claims upon him, and he provided for her without providing for them. It makes no difference that Messrs. Gurney, the bankers, seem to have been willing to forego the immediate payment of their debt; the question is, whether they

could not within a month or less after the execution of the settlement, if they had been so minded, have called in the debt and overturned the settlement?

Beyond all doubt they could, on the ground that it did not leave sufficient property to pay their debt; and this being so, we are not to speculate about what was actually passing in his mind. I am quite willing to believe that he had no deliberate intention of depriving his creditors of a fund to which they were entitled, but he did an act which, in point of fact, withdrew that fund from them, and dealt with it by way of bounty. That being so, I come to the conclusion that the decree of the learned Vice-Chancellor is right. * * *

Sir G. M. GIFFARD, L. J. In this case I quite agree with the Vice-Chancellor in thinking that if the propositions laid down in Spirett v. Willows are taken as abstract propositions, they go too far and beyond what the law is; but if they are taken in connection with the facts of that case, then undoubtedly there is abundantly enough to support the decision, for there was a voluntary settlement by a man who, at its date, was solvent, but immediately afterwards realized the rest of his property and denuded himself of everything.

Of course the irresistible conclusion from that was, that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not think that the Vice-Chancellor need have felt any difficulty about the case of Spirett v. Willows, but he seems to have considered, that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved—that is, in such cases as Holmes v. Penney, 3 K. & J. 90, and Lloyd v. Attwood, 3 De G. & J. 614, where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a Judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a posi-

tion actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them.

Now, in this case, at the date of the settlement, Mr. Custance was really insolvent; and if at the date of the settlement the bankers had insisted on payment, and had issued execution, they could not have got a present payment unless they had resorted to that particular policy. That being so, it seems to me that the facts of this case bring the matter entirely within all the decided cases, and it is enough to say that at the date of this settlement Mr. Custance was not in a position to make any voluntary settlement whatever.

That being so, the appeal must be dismissed, and dismissed with costs, as I can see no reason for saying that the decree was not right in giving the whole costs of the suit. There was, previously to this case, a decision by Vice-Chancellor Kindersley (Jenkyns v. Vaughan, 3 Drew. 419), laying down the rule that where a subsequent creditor institutes a suit and proves the existence of a debt antecedent to the settlement, he can maintain a suit such as this, and therefore it is not a new case. There can be no reason for doubting the correctness of that decision, either in point of principle or justice.[13]

In re JOHNSON—GOLDEN v. GILLAM

20 Ch. D. 389

(Chancery Division. December 13-15, 1881)

This was an action to set aside a deed of gift as fraudulent and void under the statute 13 Eliz. c. 5.

The deed of gift was dated the 12th of June, 1878, and witnessed that in consideration of the natural love and affection of Judith Johnson, widow, towards her daughters Alice and Amy, and of the covenants thereinafter contained, the said Judith Johnson granted a farmhouse and premises in Trunch, in the county of Norfolk, to Stephen Gillam and his heirs, as to one moiety to the use of her daughter Alice, and as to the other moiety to the use of her daughter Amy, and assigned the crops of the farm as to one moiety in trust for Alice, and as to the other moiety in trust for Amy. And Alice and Amy covenanted

13—See also In re Lane-Fox (1900), 2 Q. B. 508.

that they, or one of them, would "pay all the just debts incurred by the said Judith Johnson up to the date of the said indenture in connection with the working and management of the said farm," and would maintain the said Judith Johnson during her life, providing her with a home, food, clothes, and medical or other attendance in such style or manner as she had been theretofore accustomed to.

This deed of gift, which was executed by Judith Johnson and Alice Johnson, was a conveyance of all the property of Judith Johnson.

The plaintiff was a creditor of Mrs. Johnson at the date of the deed for £120. This debt was not incurred by Mrs. Johnson, but by William Johnson, her predecessor in the farm, and she had adopted it by giving a promissory note for the amount.

Evidence was offered that there were other creditors of Mrs. Johnson besides the plaintiff, who were not provided for by the deed, but the court held that none of these debts were proved to have been incurred for purposes unconnected with the farm.

The state of the family of Judith Johnson when the deed was executed was as follows: Judith Johnson was the widow of William Johnson, who had previously been the husband of her sister, and had had by her a family of whom one son, James, was living. After his first wife's death William Johnson had gone through the ceremony of marriage with Judith Johnson, his deceased wife's sister, and had a family by her, of whom George, Arthur, Alice, and Amy were living. William Johnson had provided for his children, other than Alice and Amy, out of other property, and shortly before he died he granted the Trunch farm—the subject of this litigation—by deed of gift to Judith Johnson, in consideration of her covenant "to pay all debts incurred by William Johnson in connection with the working and management of the farm, and all liabilities that he might incur for means of living, medical attendance, and expenses of a like nature."

George and James Johnson were living away from the farm, Arthur lived with his mother, Mrs. Johnson, till 1877, when he left, and, Mrs. John being then bedridden, the farm was carried on by Alice, the elder daughter, and Amy (who was an infant at the date of the deed), with the assistance of the Defendant Gillam. Gillam made them advances of money from time to time for the purchase of cattle and stock, and repaid himself out of the produce. The plaintiff claimed to set aside the deed to the

defendant as fraudulent against himself and the other creditors of Mrs. Johnson.

FRY, J., after stating the effect of the deed, said:

It is clear that the consideration for the deed of the 12th of June, 1878, was in part meritorious and in part valuable. The question before me is whether the deed is void against creditors under the statute of 13 Eliz., c. 5.

For the purpose of deciding this, it will be convenient and proper to refer to the material words of the statute, and I find these sufficiently stated in a passage of the judgment of Sir Thomas Plumer, when Vice Chancellor, in Copis v. Middleton (2 Madd. 410). He says (2 Madd. 427), "The preamble of the act is, for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, as well of lands and tenements as of goods and chattels, devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, etc., not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing * * * between man and man, without which no commonwealth or civil society can be maintained or continued. A conveyance, therefore, (the Vice-Chancellor continues), to be affected by this act, must be shewn to be feigned, covinous, and fraudulent, and made with an intent to delay, hinder, or defraud creditors: But if this case were held to be within the statute, it would be the overthrow of all true and plain dealing and bargaining between man and man; for, as a purchaser cannot know the circumstances of the vendor, it would prevent all dealing and bargaining between man and man, and counteract the object of the statute. The statute, in order to prevent this inconvenience, has by the 6th section provided that the act shall not extend to any conveyance upon good consideration and *bona fide* to any person not having at the time of such conveyance any manner of notice or knowledge of such covin, fraud, or collusion. A conveyance, therefore, cannot be invalidated by this act if there has been a *bona fide* purchaser."

In Thompson v. Webster (4 Drew. 628), Vice-Chancellor Kindersley said (4 Drew. 632), with regard to the general principle of the act, "The principle now established in this. The language of the act being that any conveyance of property is

void against creditors if it is made with intent to defeat, hinder, or delay creditors, the court is to decide in each particular case whether on all the circumstances it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder, or delay his creditors."

It is obvious that the intent of the statute is not to provide equal distribution of the estates of debtors among their creditors—there are other statutes which have that object; nor is it the intent of this statute to prevent any honest dealing between one man and another, although the result of such dealing may be to delay creditors. And cases have been cited accordingly where deeds of this nature have been held good, though the result of them has been that creditors have been not only delayed but excluded.

The effect on a deed of this sort of its being for good consideration is very great. It does not necessarily shew that the deed may not be void under the statute, because in many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors; such has been, therefore, for an unconscientious purpose, and the fact that there has been good consideration will not uphold the deed. But nevertheless it is a material ingredient in considering the case, and for very obvious reasons: the fact that there is valuable consideration shews at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult. In the case of Harman v. Richards, the Lord Justice Turner, then Vice-Chancellor, makes this observation (10 Hare, 89): "It remains to be considered whether the settlement which was thus made for valuable consideration was also made *bona fide*, for a deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge."

Lord Hatherley, when Vice-Chancellor, adopted the same view in the case of Holmes v. Penney (3 K. & J. 90), which has been discussed before me, and the same point was stated with even more force by Lord Justice Giffard in Freeman v. Pope (Law Rep. 5 Ch. 538). He said in that case (Law Rep. 5 Ch. 544), "I do not think that the Vice-Chancellor need have felt any difficulty about the case of Spirett v. Willows (3 D. J. & S. 293), but he seems to have considered that in order to defeat a volun-

tary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved, that is in such cases as Holmes v. Penney (3 K. & J. 90), and Lloyd v. Attwood (3 De G. & J. 614), where the instruments sought to be set aside were founded on valuable consideration; but where a settlement is voluntary, then the intent may be inferred in a variety of ways." I therefore proceed to inquire, looking to all the circumstances of the case and at the nature of the instrument itself, whether I can or ought to infer an intent to defraud creditors in the parties to the deed. I say in the parties to the deed, because it appears to me to be plain that whatever fraudulent intent there may have been in the mind of Judith Johnson, it would not avoid the deed unless it was shewn to have been concurred in by Alice, who became the purchaser under the deed. It has not been contended, and it could not be contended, that the mere fraudulent intent of the vendor could avoid the deed, if the purchaser were free from that fraud.

[HIS LORDSHIP then adverted to the provision which had been made before the date of the deed for the other children of Judith Johnson, and continued:—]

Having regard to the condition of the family, the deed was a highly proper one; the sons had left the home, and were provided for by the dispositions which their father had made of the residue of his property; Mrs. Johnson was possessed of this farm and of nothing else; the two single daughters living with her must have been objects of her anxiety and care; she was bedridden and not likely to recover; the farm was practically carried on by Alice. Thereupon this deed was executed with the obvious intention of making over to the daughters that farm which their mother hoped they would reside on after her decease, to avoid the heavy succession duty which would ensue if she allowed the farm to pass to them under her will, they not being legally her children, but strangers to her. The deed is, I observe, framed on the model of the previous deed, which had been executed by her husband on his death-bed.

Now, it is important to inquire what was the indebtedness of Mrs. Johnson when she executed the deed. She appears to have had some current debts, mostly, if not entirely, in respect of the farming business. She owed a Mr. Simpson, a witness in the

case, an account for saddlery, the whole of which (with possible one unimportant exception) was due in respect of the carrying on of the farm. She owed her sister Sarah Golden £80, and I cannot infer that that money was borrowed for any other purpose than carrying on the farm, because it is for the plaintiff to shew that that was so, and he has had Sarah Golden in the box and has not asked her anything about it. The sum of £120 was owing from Judith Johnson to her brother William Golden, the plaintiff. That sum was borrowed by William Johnson, and when she became the owner of the farm she adopted the debt by executing a promissory note, and there was a mortgage debt upon the farm, which had also been a debt of William Johnson. It appears by the evidence that Mrs. Johnson was a person of good repute among her friends, as a respectable and honest woman, who paid her way, and was in no difficulty. Beyond what I have mentioned she does not appear to have owed anything except ordinary current debts, and was not pressed by a single creditor. That was the state of things when this instrument was executed. One other fact I must mention with regard to the state of the family, which is this, that litigation had been going on which led to some alienation of feeling between Mrs. Johnson and other members of the family, and which made it more natural that she should desire the whole of this farm to go for the benefit of her two daughters. Mr. Gillam appears to have been the most natural person to select as trustee of the deed, if the purpose of the parties was honest and fair. From what I have seen of him, I do not believe he is a person who would have been a party to a deed which was intended to be kept secret, or to be entered into for the purpose of fraud. I think his selection as trustee is an indication of the good faith with which the transaction was conceived.

With regard to what took place under the deed, it appears to me that there was neither concealment nor publication. Mrs. Johnson's name continued to be used as before with regard to the farm. The daughter continued to make the payments, and there was no material change in the way that things were carried on.

The circumstances, looked at independently of the result of the deed, therefore lead me to the conclusion that the intention of the parties was to make a perfectly honest family arrangement, under which the daughters were to undertake the burden of paying their mother's debts, and in consideration of that, to

take immediately that farm which in all probability they would otherwise have received by will upon their mother's death.

Then it is said, and said truly, that a person must generally be taken to intend the result of his acts. That is often, but by no means always, true, because, although no doubt the immediate and main result of our acts must be the object of our intention, there are many collateral results of acts which are not only not objects of our intention, but against our wish. There are many unintentional results of intentional acts. The operation of the deed, it is said in this case, was to defeat and delay creditors, therefore it is said that that must have been intended. That argument has been presented in two ways. In the first place it has been observed that the deed contained a provision only for the payment of creditors whose debts had been contracted in connection with carrying on the farm: It is said that there must have been debts of other descriptions, and that there was in fact one debt at any rate of another description. But it does not appear to me to be shewn that that debt was present to the mind of the settlor, Mrs. Johnson, or to the mind of her daughter; and nothing is more probable, if I were to speculate upon the intention, than that Mrs. Johnson, having adopted the debt of William Johnson, after a deed conceived in similar terms, would have anticipated that her daughters must in like manner adopt the debt of their uncle under this deed. It appears plain from the case of Holmes v. Penney (3 K. & J. 90), that the mere fact of a *bona fide* creditor being defeated is not of itself sufficient to set aside a deed founded on valuable consideration. In this case, if I uphold the deed, it seems probable that the plaintiff will have no remedy in respect of his debt. In that case, by upholding the deed, the plaintiff was excluded from all remedy in respect of his debt, and that debt must have been plainly present to the mind of the settlor, but the Vice-Chancellor thought that the only object of the brother, who was the purchaser of the estate, was to make an honest family arrangement with regard to it. So it appears to me, in the present case, that the object of the mother and daughters was to make an honest family settlement of the property.

Then again it is said that with respect to many creditors who are included in the covenant, they are defeated and delayed, because before the execution of the deed they had a right against the property, and after the execution of the deed they would only have a right to the enforcement of the covenant. But that

is the result of almost any dealing. If I am indebted and sell my estate, my creditors lose their right of proceeding against the estate, and can only proceed against the purchase money. So in a variety of cases visible chattels or real estate are converted into *choses in action*, and if creditors could complain of that it would, as Sir Thomas Plumer pointed out, "restrain honest dealings and transactions between man and man."

There is only one other point on which I wish to observe, although it has not been put to me. It appears plain, that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a *bona fide* and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud, and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case.

I have come, therefore, to the conclusion upon the whole of the case, that the instrument impeached was executed in good faith and for a valuable consideration, that it was an honest family arrangement, and was executed without any intention to defraud or delay creditors. That being so, I dismiss the action with costs.

CRUMBAUGH v. KUGLER

2 Oh. St. 374

(Supreme Court of Ohio. December Term, 1853)

CALDWELL, J. This is a bill filed by the creditors of Matthias Kugler, the principal object of which is to set aside certain conveyances made by him to his children in March, 1847. At the time of these conveyances, Matthias Kugler was possessed of property (according to the estimate of the master to whom this case was referred) of the value of $176,540.65, and was indebted to the amount of $98,327.86. About $146,000 of the property consisted of real estate—on which were several mills and distilleries. On the 13th of March, 1847, Matthias Kugler conveyed to different members of his family what in the aggregate amounted to $105,674.74. On the property thus conveyed, over $40,000 of Kugler's indebtedness was secured by

mortgage—the grantees took the property subject to the liquidation of these incumbrances. Schultz and Kugler, two of the grantees, also executed a mortgage to Matthias Kugler, Sen., to secure the payment of about $15,000 more of the indebtedness. The amount of Kugler's indebtedness intended to be secured by this family arrangement amounted to about $55,800. The amount of Kugler's indebtedness left wholly unprovided for by the arrangement, is stated by the master in the alternative; upon one hypothesis, it amounts to $42,599.55, and on the other to $47,190.05.

The master estimates the property retained by Kugler, at the time of the conveyance to his family, at $70,837.93; the real estate he values at $51,152, and the personalty at $19,685.93. This estimate, the master reports, is made by setting down to Kugler's sole account several tracts of land that had been conveyed to Kugler and wife, and stood in their names, and the half of which, it is contended, belonged to Mrs. Kugler's heirs. Deducting the one-half of the value of the property thus situated, the real estate retained by Kugler would amount, according to the master's estimate, to $28,376, and the entire assets, real and personal, retained, to $48,061.93. This latter the court regard as the true estimate. The property in the joint names of Kugler and wife, was the property that formerly belonged to Mrs. Kugler's father, Christian Waldsmith. On the death of Christian Waldsmith, Mrs. Kugler, as heiress, became entitled to one-seventh. A petition was filed by some of the heirs for partition; Kugler and wife elected to take the property, and the sheriff conveyed it to them jointly, on Kugler giving bond to pay the other heirs. Although Kugler may have considered this property as his, and liable to the payment of his debts, yet Mrs. Kugler had the legal title to the one-half by the conveyance, and was the owner of one-seventh previous to that time. The title had remained in their joint names since 1817, and we think the one-half of the property belonged to Mrs. Kugler, and at her death descended to her heirs, and could in no way be liable for Kugler's debts. Kugler continued, after the conveyances, to carry on an extensive business, until some time in 1849, when he failed; his mill and distillery were destroyed by fire, and he became largely insolvent.

It is said, on the part of the complainants, that these conveyances were fraudulent, as to the creditors of Matthias Kugler.

The first question that we propose to consider, is whether

there was any *actual fraud* intended by Kugler in thus disposing of his property.

Wherever a person, largely indebted, gives away a large amount of his property, without amply providing for the payment of his debts, a suspicion of fraud will generally attach to the transaction. There are, however, connected with this case many circumstances going to rebut any suspicion that fraud was *intended.* Kugler was engaged at the time in a very extensive business; the arrangement does not appear to have been made with any intention of stopping business, although the conveyance of this property necessarily curtailed his operations; for two years after, however, he continued to operate extensively.

From the number and amount of his debts that he afterward contracted, it would appear that he still had credit, and must have been regarded as a responsible man.

After the conveyance, he commenced paying off his indebtedness that existed at that time, and although the evidence does not furnish us with any certain data on the subject, yet it appears that he succeeded in paying off the principal part of that indebtedness. The most of the debts that he now owes are such as were contracted after the conveyance, or such as were secured by it. It was very natural, considering the advanced age of Matthias Kugler, that he should find it necessary to contract his business. His sons and sons-in-law had been doing business for him at his different milling and distillery establishments. By making the conveyances as he did, he could free himself from a large portion of his indebtedness, establish several members of his family in business on their own account, and free himself from the harassing care of such an extensive and complicated business. He acted as if he intended to retain the property reserved; he says in his answer, that he intended the Germany property at his death for his son Jacob; his conduct accords with this statement; no conveyance is made to Jacob, and he enters into partnership with him.

It may be said, however, that Matthias Kugler gave away too much of his property, considering the amount of his indebtedness. In reference to this, we would say, in the first place, that from the manner in which Mr. Kugler obtained and used the property, and treated it, that he made no distinction between that which stood in the names of himself and wife jointly, and

his other property, and regarded it as liable to the payment of his debts; which opinion, although erroneous, would lead him to believe that he had retained for the payment of his debts more than twenty thousand dollars' worth of property, above what he really had. But, supposing we are mistaken in this supposition, still the amount of property retained that absolutely belonged to Matthias Kugler is valued at more than all his indebtedness. A part of this property consisted of a mill and distillery which Kugler had been carrying on for many years; if his business in future should be profitable, he would be able to pay his debts, and he no doubt continued it in the expectation that it would be so. Kugler's conduct and business transactions, after these conveyances were made, show that they were not made with any intention of suspending business; on the contrary, they show that his business, although disastrously, was vigorously pursued, and he only suspended when he was compelled to do so. We think from the whole facts in the case, that although, as future events proved, this family arrangement was improvidently made, yet that no actual fraud was intended at the time it was consummated, on the creditors of M. Kugler. Nor is there any circumstance to induce the belief that any fraud was intended as to subsequent creditors.

But, although we do not think that any fraud was intended by the parties to these conveyances, the question still remains, whether they operated to the prejudice of creditors.

These several conveyances must be considered in the light of gifts. It is true, that part consideration was received in most of the cases; yet we think that does not change the character of the transaction. Although other motives no doubt induced the arrangement, yet the ruling object was to make an advancement to the several grantees. Now, a man largely indebted, as Kugler was, can not make a gift of his property without the most careful regard to the rights of his creditors. And such gift is never upheld, unless property, clearly and beyond doubt, is retained sufficient to pay all the donor's debts. See King's Heirs v. Thompson and wife, 9 Peters, 220; Salmon v. Bennett, 1 Conn. 543; Jackson v. Peck, 4 Wend. 303; Hinde v. Longworth, 11 Wheaton, 199; Seward v. Jackson, 8 Cow.; Jackson v. Form, 4 Con. 604; Gale v. Williamson, 8 Mees. & Welsby, 409; Seward v. Vanwyck, 1 Edw. Ch. 334; Brackett v. Waite,

4 Vt. 389; Usher v. Hazletine, 5 Greenl. 474; Chambers v. Spencer, 5 Watts, 404; Morteer v. Hissim, 3 Penn. 165; Wallace, 108; Lessee of Burget v. Burget, 1 Ohio, 482; Brice v. Meyers, 5 Ohio, 124; Lessee of Douglass v. Dunlap, 10 Ohio, 162; Miller v. Wilson, 15 Ohio, 114; Tremper v. Barton, 18 Ohio, 423; Creed v. Lancaster Bank, 1 Ohio St. 1.

Now, how was it in this case? The property retained by Kugler, liable to the payment of his debts, amounted to about $48,000. His debts, at the lowest calculation, amounted to $42,000, and they probably amounted to $47,000. But taking the amount of indebtedness at the lowest estimate, $42,000, and experience teaches us that, owing to the expenses incident to the sale, and the sacrifice almost universally attending forced sales, the amount of property reserved would not have paid the debts, if subjected to that purpose. Kugler, then, not having reserved property clearly ample to pay his debts, was not in a situation to make the gifts good, and the conveyances, as to all debts in existence at the time of their execution, must be held as of no effect.

The next question that arises in the case is, whether the conveyances not being good as to the prior creditors, the subsequent creditors can avail themselves of that objection?

Now, we have previously determined, that these conveyances were made without any intentional fraud as to either prior or subsequent creditors. If Kugler had not been in debt, he would have had a perfect right to distribute his property amongst his children; no person could have objected. No policy of law, or principle of justice, would have been violated; his gift of his property would have been as valid as a sale. It is only because that, being in debt, he is bound in good faith to have a regard, in the disposition of his property, to the just claims of his creditors—to regard the obligation which he has incurred to them—that any objection can be made to the transaction. This principle does not apply at all to the subsequent creditors; they give credit to their debtor as he is—for what he has, not for what he once had. We must then regard the conveyances, as to subsequent creditors, and all persons other than the creditors, then occupying that relation, as good. See United States Bank v. Housman, 6 Paige Ch. 535; Saxton v. Wheat., 8 Wheat. 229; Hinde v. Longworth, 11 Wheat. 199; Parker v. Proctor et al., 9

Mass. 374, 4 Wash. C. C. 137; Lush v. Wilkinson, 5 Vesey, Jr. 387; 9 Peters 220, 12 Vesey, Jr. 155. * * *

Decree for complainants.[14]

CHURCH v. CHAPIN

35 Vt. 223

(Supreme Court of Vermont. February Term, 1862)

Ejectment. The plaintiff claimed title under a warranty deed from one Fortin Church to him, dated October 29th, 1855.

The defendant offered in evidence certified copies of the record of a judgment in favor of one Deborah Church against Fortin Church, rendered in 1858, for $524.50, for which sum execution issued May 4th, 1858; also, a copy of this execution and the officer's return thereon, showing a levy of the same upon the premises in question; also, a warranty deed from Deborah Church to the defendant, Chapin, dated April 4th, 1859, to all of which the plaintiff objected, but the court admitted them, and the plaintiff excepted.

It appeared in evidence that at the date of the deed from Fortin Church to the plaintiff, Fortin Church was a single man, without issue, and of about sixty-four years of age; that at the time of the execution of the deed, Fortin Church also executed, under seal, a bill of sale to the plaintiff of all his personal property, except clothing, cash on hand and debts due; and at the same time the plaintiff executed to Fortin Church a mortgage deed of all the real estate described in the deed of Fortin Church to the plaintiff, conditioned for the payment of certain debts of Fortin Church, amounting to about $850, for the payment to certain nephews and nieces of the said Fortin (twenty-eight in number), of $100 each, and for the maintenance, care and support of the said Fortin Church during his natural life. The plaintiff was a nephew of Fortin Church, and immediately took possession of the personal property conveyed, and entered upon the support of Fortin Church. The conditions named in the mortgage constituted the consideration of said conveyance. There was no provision that the plaintiff should pay the debt of

14—See 20 Cyc. 453-461, for references to many cases involving the same or similar questions.

Deborah Church, nor any evidence that the plaintiff or Fortin Church at the time of the conveyance supposed she had a debt against Fortin Church; but they were both aware that she claimed that Fortin Church was indebted to her, and that was a subject of conversation between Fortin Church and the plaintiff at the time.

It appeared that said judgment was recovered for the personal services of Deborah Church for Fortin Church as his housekeeper from 1850 to the spring of 1855; that Deborah was a single woman of between fifty and sixty years of age, without any other home, and that the plaintiff, though knowing to the fact of Deborah Church's working for Fortin Church, supposed that she was making it her home with her brother, Fortin Church, and did not suppose that she was at work for pay. There was no evidence tending to show that said conveyance was made for the purpose of defrauding Deborah Church, or that there was any intentional fraud on the part of the plaintiff or Fortin Church.

The plaintiff offered evidence to prove that at the time of the conveyance to him no actual indebtedness to Deborah Church from Fortin Church existed, to which the defendant objected. The court rejected the evidence, to which the plaintiff excepted.

It appeared in this connection that Deborah Church's suit was commenced in August, 1856, and was defended throughout by the plaintiff, as agent of Fortin Church, and in consequence of his taking the conveyance of Fortin Church's property.

It appeared that at the time of the conveyance from Fortin Church to the plaintiff, the cash on hand and debts due, reserved by Fortin Church, in said bill of sale, consisted of $100 cash on hand, a debt of about $200 against one Bardwell, of Walpole, New Hampshire, a note of $75 against James Church, of Townshend, Vermont, notes against the Stones, of Westminster, Vermont, of about $300, a note against one Sawtell, of Bellows Falls, of about $400, and notes against men by the name of Phillips, in the state of New York, then amounting to about $1,100. All of these debts were considered good except the note against Sawtell. The notes against the Phillipses were secured by mortgage in New York, and were intended to be made a gift to the sons of his sister, their mother, by Fortin Church, and were soon after so disposed of. The plaintiff had nothing to do with these debts due or cash on hand, except that

it appeared that there were other debts against Fortin Church, amounting to about $200, not mentioned in said mortgage, which the plaintiff afterwards paid at Fortin Church's request, and Fortin Church gave him notes sufficient to pay him for so doing. It appeared that it was the understanding between the plaintiff and Fortin Church that the plaintiff was to have all of Fortin Church's personal property at Fortin's decease, and they supposed the last clause in the bill of sale was sufficient to convey said debts and personal property at Fortin Church's decease.

The court intimated an opinion to the plaintiff's counsel that the conveyance to the plaintiff by Fortin Church, being a disposition of his property to collateral relations, and to secure his own maintenance, must be treated, in law, as a voluntary conveyance, and that as the claim of Deborah Church existed prior to the conveyance and was known to both parties, and subsequently matured into a judgment after full defence made by the plaintiff, it became conclusively, as to him, a prior existing debt of the grantor, which would render the conveyance inoperative as to her, notwithstanding the plaintiff might have acted in perfect good faith in the whole transaction, and that the amount and kind of property retained by the grantor, as above stated, could not be properly regarded as an ample proportion of his estate for the security and indemnification of his creditors, and that the title of Deborah Church thus acquired must be regarded as paramount to that of the plaintiff. Whereupon the court directed a verdict for the defendant, and the plaintiff excepted to the foregoing decision.

PECK, J. The question in this case is which of these parties acquired the better title from Fortin Church. The plaintiff shows title by deed from Fortin Church, dated October 29th, 1855. The defendant shows title by levy of an execution in favor of Deborah Church against Fortin Church, in 1858, for between $500 and $600, issued on a judgment recovered in 1858, in a suit commenced in 1856, and by deed from Deborah Church to the defendant, dated April 4th, 1859. Nothing appears invalidating the deed to the plaintiff as against Fortin Church. The question is whether it is good against his creditors, or rather against the creditor under whose levy the defendant claims. The case finds that in the execution of the deed to the plaintiff there was no fraud in fact, or actual intent to defraud creditors generally, or to defraud this particular creditor. As-

suming for the present that Deborah Church was a creditor of Fortin Church in respect of the debt or claim for which she levied, at the date of Fortin Church's deed to the plaintiff, the question arises whether upon the facts stated in the exceptions, the amount, nature and character of the consideration of that deed was such as to render it valid against Deborah Church as such creditor, or whether as to her and the defendant who has her title, it is to be treated, as the county court treated it, as a voluntary conveyance and inoperative against her levy. On reference to the judge's minutes of the testimony referred to, and the deed and bill of sale, it appears that the amount of property conveyed to the plaintiff by Fortin Church on that occasion was, in round numbers, from $7,000 to $10,000. The consideration for this property is all expressed in the mortgage deed from the plaintiff to Fortin Church, from which it appears that the plaintiff was to pay certain specified debts of his grantor, amounting to about $850, and pay to the children of certain persons named $100 each, as they should respectively arrive at the age of twenty-one years, and also support Fortin Church during his natural life. It appears there were twenty-eight of these children, who were the nephews and nieces of the plaintiff's grantor. If the $850 and the $2,800 constituted the whole consideration for this property, it would be regarded as so far below the real value of the property as to render the conveyance void as against existing creditors, on the ground of inadequacy of consideration. A debtor cannot give away his property, and thereby deprive his creditors of all means of collecting their debts. He must be just before he is generous; or in other words, he must not be generous at the expense of justice to his creditors. If such is the effect the gift is void as to creditors. Nor can this principle be avoided by having a partial consideration. In such case the gift is equally void, at least to the extent of the want of consideration. But in this case there is a further consideration, the agreement of the plaintiff to support the grantor during life. The amount or value of this part of the consideration is in its nature so uncertain, depending so much on future contingencies, the duration of life and the future wants and requirements of the grantor, that it can not be assumed that the consideration was inadequate in amount. The question must turn upon the character of the consideration. The $850 which the plaintiff agreed to pay to the two creditors named in the mortgage deed can not be objected to as to its character;

and although the grantor in this disposition of his property made no provision for the payment of the debt to Deborah Church, she can not set aside that deed on the ground that the grantor gave preference to other creditors. Whether the $2,800 the plaintiff agreed to pay to the collateral relatives of the grantor should also be so considered, is not so clear. On the one hand it may be said that although it was a gift as between such relatives and the grantor, yet as between him and the plaintiff it was to be a payment, and that the want of consideration as between the plaintiff's grantor and the persons to whom the grantor required the plaintiff to make the payment, can not affect the deed. On the other hand it may be said that as the plaintiff was a party to this arrangement by which this grantor was giving away this portion of the consideration of the deed, and not having paid or legally bound himself to the donees to pay to them, he ought not to be allowed to stand upon this agreement with the grantor, and thus perfect the gift to the detriment of creditors, a gift which the grantor, as to creditors, had no right to make. But we do not find it necessary to decide whether this agreement to pay the $2,800 in the manner stipulated, is a good consideration to that amount as against creditors or not, because the remaining portion of the consideration, the agreement for support for life, is not of such a character as will sustain the deed if the creditors are thereby deprived of the means of collecting their debts. It is true that as between the parties to the deed it is a valuable consideration, and in this respect a deed founded on it differs from a gift; but as to creditors it is not different from a deed of gift. It has long been settled that a party can not either by gift or in consideration of an agreement for support for life, convey his property without reserving what is amply sufficient for the payment of his then existing debts. If we allow the plaintiff the benefit of the $850 and the $2,800, as a good consideration to that extent, there is still, at the lowest estimate of the property, between $3,000 and $4,000 of the consideration accounted for in no other way than by the agreement for support. Where there is a partial, but not a full consideration good against creditors, whether the deed is voidable *in toto*, or only to the extent of the want of consideration, is a question not material in this case, as the amount of the consideration resting on the agreement for support exceeds the amount of the levy in question. The levy must prevail over the deed, unless the

property of the grantor not conveyed is sufficient to prevent that result.

A creditor has no right to impeach a conveyance of his debtor on the ground that it was voluntary, or without sufficient consideration, unless it would operate, if allowed to stand, to his detriment in the collection of his debt. The debtor is bound to reserve property ample for the payment of his debts. Whether the property reserved is what will be deemed ample for this purpose, does not depend entirely on the amount and value, as the real end to be accomplished is, that the deed or conveyance shall not deprive creditors of the means of collecting their debts. Hence the nature and situation of the property is to be regarded as well as the amount and value, in view of the facilities the creditors have left for the collection of their debts. In this case the debtor conveyed all his property except $100 cash on hand, and debts due him. These debts amounted nominally to $2,075, due from various individuals. The debt of $400 against Sawtell may be thrown out, as Sawtell had failed and become insolvent. This leaves the amount due the grantor $1,675. In relation to the Phillips' debt of $1,100 and the Bardwell debt of $200, the debtors resided out of this state, so that they could not be reached by process in this state; as debts due from persons residing out of the state are not attachable by trustee process, except in some particular cases. The cash on hand was in point of law liable to attachment if so situated that an officer could obtain possession of it without committing a trespass on the person of the owner; but it is not probable that it would be accessible for the purposes of attachment so as to be available to a creditor, especially as the amount was so small. Deducting the $400 debt as worthless, there was but $375 of the debts reserved by the grantor that was attachable, and that only by trustee process. The grantor owed about $200 besides this debt for which the levy was made and the debts the plaintiff agreed to pay. This $200 the plaintiff paid, and it was repaid to him out of the debts the grantor reserved. There is another fact stated worthy of consideration; that is, at the time Fortin Church made the conveyance in question, it was his purpose to give the $1,100 debt to certain collateral relations in the state of New York, where the debtor resided, and it was soon after so disposed of. The bill of sale to the plaintiff also professed to transfer all the personal property that Fortin Church might own at his decease, and the parties so understood its legal

effect. The rule that a party who conveys his property without sufficient consideration, such as will be valid against creditors, must reserve property ample for the payment of his existing debts, is from its nature somewhat general and indefinite; and whether sufficient is reserved in a given case to answer this purpose, depends, as already stated, on the amount and nature, in connection with the character and situation, of the property in reference to the facilities it affords the creditors for collecting their debts. We think upon all the facts appearing in this case the conveyance must be regarded as invalid as against the levying creditor, if she was a creditor at the time of this conveyance, in respect of this debt. This conclusion is the more just since it appears that the grantee knew at the time he took the conveyance, that this creditor had rendered services for the grantor, and that she claimed he was indebted to her for such services, and yet he took the deed and bill of sale without any provision for the payment of this debt.

The only remaining question is whether the county court erred in excluding certain evidence offered by the plaintiff. The case states that "the plaintiff offered evidence to prove that at the time of said conveyance to him, no actual indebtedness to said Deborah Church from said Fortin Church existed" which was excluded by the court. If this offer is to be construed as an offer merely to show the time when the debt accrued, and that it accrued subsequent to the conveyance, the decision was erroneous, as the evidence would not necessarily tend to impeach the judgment. A judgment, even between the same parties, is conclusive only of such facts as must have been found to warrant the judgment. This judgment may be correct, and yet the debt not have existed till after the conveyance. But we do not so understand the offer. The offer evidently was to show that no debt ever existed on which the recovery was had, for the exceptions state that *it appeared* that the judgment was recovered for the services of Deborah Church (Fortin Church's sister) as his house-keeper from 1850 to the spring of 1855. The deed was not executed till October, 1855. The offer therefore must be understood as an offer to show that the judgment was founded on no actual indebtedness, and not an offer to prove that the debt accrued after the conveyance. The evidence offered tended directly to impeach the judgment. The judgment is clearly conclusive on this point upon Fortin Church. But in order to entitle a creditor to impeach a conveyance of his debtor for want of

sufficient consideration where there is no fraud, it must appear that he was a creditor, and a judgment in his favor against the grantor is not conclusive against the grantee who is no party to it. He may, as a general rule, show that the judgment was collusive, and not founded on an actual indebtedness or liability. But in this case the plaintiff can not be regarded as a stranger to the judgment, as it appears that the suit was defended by this plaintiff not only as agent of Fortin Church, but also in his own behalf to protect the property conveyed to him by the defendant in that suit. Under such circumstances the plaintiff can not be permitted again to try the question of indebtedness. He is bound by the result of that suit.

The judgment of the county court is affirmed.[14a]

GORMLEY v. POTTER

29 Oh. St. 597

(Supreme Court of Ohio. December Term, 1876)

Motion for leave to file a petition in error to reverse the judgment of the District Court of Cuyahoga county.

The original petition was filed by Abel H. Potter and others, judgment creditors of Patrick Gormley, against said Patrick and Ann his wife, Edward Flynn, and the West Side Home and Loan Association.

The plaintiffs below having recovered a judgment against Patrick Gormley and one Edward Keegan, caused an execution issued thereon to be levied on the real estate described in the petition.

The petition avers, in substance, that with intent to defraud his creditors, Patrick Gormley had, previous to the levy, conveyed the premises to Edward Flynn, who, for the purpose of consummating the fraud, conveyed the same to the wife of Patrick. The West Side Home and Loan Association held a mortgage on the premises.

The object of the petition was to have the conveyances from Patrick to Flynn, and from Flynn to Patrick's wife, set aside, and the property sold free from all claims on account thereof,

14a—See further Walker v. Cady, 106 Mich. 21, 63 N. W. 1005; Harris v. Brink, 100 Iowa, 366, 69 N. W. 684, 62 Am. St. Rep. 578; Egery v. Johnson, 70 Me. 258; Kelsey v. Kelley, 63 Vt. 41, 13 L. R. A. 640. *Cf.* Tibbals v. Jacobs, 31 Conn. 428.

and to adjust the liens between the plaintiffs and the loan association.

The case was taken to the District Court by appeal, where a decree was rendered, granting the plaintiffs the relief prayed for.

It is claimed that the petition is defective in not averring that the judgment debtor had no other real or personal estate subject to execution for the payment of the plaintiffs' judgment.

For this alleged defect, leave is asked to file a petition in error to reverse the judgment of the District Court.

WHITE, J. The ruling of the District Court is correct. The mistake of the plaintiff in error is in regarding the original petition as in the nature of a creditor's bill to reach equities of the judgment debtor.

The action is not founded on § 458 of the code. In order to maintain an action under that section, it is necessary to aver that the judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment.

The land in controversy was subject to levy on execution, and the levy upon it was properly made. The conveyance to Flynn by the judgment debtor, and by Flynn to the debtor's wife, having been made with intent to defraud creditors, was, as against the creditors, absolutely void. As respects the rights of creditors, the land was still the property of the judgment debtor, and subject to execution as fully as if the conveyance had not been made.

The petition was founded upon the fact that the land had been taken in execution, and had for its object the removal of the cloud cast upon the title by the fraudulent conveyance. The removal of this cloud was in the interest of both the debtor and the creditors by enabling the property to be sold at a better price. That a suit may be maintained for this purpose, has been several times declared by this court. Sockman v. Sockman, 18 Ohio, 366; Beaumont et al. v. Herrick, 24 Ohio St. 455, 456.

Whether, at the time of making the conveyance, the debtor retained sufficient property to satisfy his creditors, would be a proper subject of inquiry in determining the character of the conveyance.

But if the conveyance is found to be fraudulent as to creditors, and thus the property was properly taken in execution, neither the debtor nor his fraudulent grantee can require the creditor to abandon his levy, on the ground that the debtor has other prop-

erty which might have been taken by the creditor. Westerman v. Westerman, 25 Ohio St. 500. Before a valid levy can be made on land, the goods and chattels of the judgment debtor subject to levy must be first exhausted by the officer having the execution. This is averred to have been done in the present case before the levy was made on the lands in controversy.

The case of Bomberger et al. v. Turner et al., 13 Ohio St. 264, relied on by the plaintiff in error, was an action brought under § 458 of the code, to subject the equitable interest of the debtor in certain lands which had descended to his heirs, to the payment of a decree obtained against him in his lifetime. There had been no levy in that case, and it was averred in the petition that the conveyance was made in trust for the debtor. That case stands on a different footing from the present, and is no authority against the decision of the court below. * * *

Leave refused.

BIBB v. FREEMAN

59 Ala. 612

(Supreme Court of Alabama. December Term, 1877)

On the 29th day of December, 1857, Fleming Freeman sold and executed to Joseph B. Bibb a deed of conveyance of twelve hundred and eighty-five acres of land situated in the county of Montgomery. The deed contained the usual covenants of warranty. The purchaser entered upon and took possession of the premises, for which he paid nineteen thousand two hundred and seventy-five dollars.

About the 23rd day of November, 1859, one Jesse Boseman, as the guardian of Daniel Flinn (a minor), instituted a suit in the Circuit Court of Montgomery county against Joseph B. Bibb to recover of him about eighty acres of land held by Bibb under the deed of Freeman. Due notice of the pendency of this suit was given to Freeman; and at the June term, 1868, of the Montgomery Circuit Court, a judgment for the land and damages for its detention, was rendered against Bibb. In September, 1869, Joseph B. Bibb made his will and died. By it James M. Newman was named as executor. He accepted the appointment and entered upon the discharge of his duties.

In the meantime Fleming Freeman had become totally insolvent.

For the purpose of recovering damages for the breach of covenants contained in the deed executed by Freeman to Bibb on the 29th day of December, 1857, Newman filed a bill of complaint in the Chancery Court of Talladega county on the 10th day of July, 1872. The complainant sought to set aside the following deeds of conveyances, and to subject the land therein described to the payment of the said damages:

"The State of Alabama, Montgomery county. Know all men by these presents, that I, Fleming Freeman, of the county and state aforesaid, for and in consideration that David H. Remson shall come and abide on my plantation, known as the Taylor plantation, and plant a portion thereof under an agreement made between the said Remson and myself, bearing date with this instrument, and for the further consideration of good-will and affection which I bear to said Remson and his family, give, grant and convey unto said Remson the following described lands, viz.: Southeast quarter of section twenty-two, southwest quarter of section twenty-three, northeast quarter and southeast quarter of section twenty-seven, and northwest quarter and southwest quarter of section twenty-six—all in township sixteen and range eighteen—to have and to hold the same to him, subject to the following conditions and trusts, viz.: During my life I am to have the right to cultivate such portions of said lands as is authorized under the agreement between said Remson and myself as above named. After my death, the said David H. Remson, should he survive me, shall hold the said lands during his life-time for his own use and benefit, and at his death the said lands shall be vested in Caroline N. Remson, wife of said David H. Remson should she then be living, and all the children of the said David H., excepting Charles F. F., and Seaborn W., the oldest children of said Caroline N., for whom other provision has been made. But should the said Caroline N. not be living at the death of the said David H. Remson, then the said lands shall vest in all the children of the said David H. Remson, excepting the said Charles F. F. and Seaborn W.

"And I, Nancy Freeman, the wife of the said Fleming Freeman, for the good-will and affection I bear to the said David H. Remson and his family, do hereby relinquish all right of dower in the real estate herein described, and hereby join in this conveyance.

"In witness of all of which, we the said Fleming Freeman and

Nancy Freeman have hereunto set our hands and seals this ..... day of January, 1859.

"Fleming Freeman,
"Nancy Freeman."

"The State of Alabama, Montgomery county. By these presents, I, Fleming Freeman, and Nancy Freeman, wife of Fleming Freeman, of the above state and county, do make this codicil to a deed of gift made to David H. Remson, his wife, Caroline N. Remson and children, bearing date January, 1859, and recorded in the office of the judge of probate of said county on the 16th day of May, 1859. One of the considerations of the deed of gift as described above, requires the said Remson to live and abide on the plantation, and to plant a portion thereof under an agreement made between said Remson and myself, said agreement bearing date with the deed of gift, thereby depriving said Remson and family from moving or leaving said plantation, in the event they should think proper to do so. Now, for the purpose of securing the Taylor tract of land, as described in the deed of gift, to the said Caroline Remson and her children by the said D. H. Remson, we do hereby declare all articles of agreement affecting or in the least detrimental to his interest or her interest, null and void, and of no further value, and we do furthermore, in consideration of the good-will and affection which we bear to said Remson and family, give, grant and convey unto Caroline Remson and children, the following described lands as described in the deed of gift to said D. H. Remson and family, viz.: Southeast quarter of section twenty-two, southwest quarter section twenty-three, northeast quarter, southeast quarter section twenty-seven, northeast quarter of southwest quarter of section twenty-six—all in township sixteen and range eighteen—to have and to hold the same during her life, and after her death to the said D. H. Remson's children. It is furthermore expressly understood that this deed of gift is not to take effect until after the death of myself and my wife, Nancy Freeman. In fee simple whereof we have hereunto set our hands and seals, this ninth of May, in the year of our Lord one thousand eight hundred and sixty-four.

"F. Freeman (L. S.),
"Nancy Freeman (L. S.)."

At the time of the execution of the foregoing deeds, the grantor was not in debt, and possessed great wealth.

The chancellor, on the final hearing, dismissed the bill of com-

plaint for want of equity. After the decree, and before an appeal was taken, the complainant died. Mrs. Martha D. Bibb was then appointed administratrix *de bonis non*, with the will annexed. Upon her petition, the suit was revived, and an appeal was taken to the Supreme Court.

BRICKELL, C. J. The law in this state is settled, that as to existing creditors, a voluntary conveyance by a debtor is by presumption of law, absolutely void, though no fraudulent intent is imputable to donor or donee, and though the donor may have reserved from the conveyance property more than sufficient for the satisfaction of all debts and demands against him. Miller v. Thompson, 3 Port. 196; Foote v. Cobb, 18 Ala. 585; Gunnard v. Eslava, 20 Ala. 732; Thomas v. De Graffenreid, 17 Ala. 602; Moore v. Spence, 6 Ala. 506; Stiles & Co. v. Lightfoot, 26 Ala. 443; Huggins v. Perrins, 30 Ala. 396.[15]

15—The same doctrine is established in several other states. In New Jersey—Gardner v. Kleinke, 46 N. J. Eq. 90; Horton v. Bamford, 79 N. J. Eq. 356; in Kentucky — Carrol's Stats. (1907) § 1907; in Virginia—Fink v. Denny, 75 Va. 663; in West Virginia—Lockhard v. Beckley, 10 W. Va. 87. This doctrine is founded upon the decision of Chancellor Kent in Reade v. Livingston, 3 Johns. Ch. 481.

"It was at one time the rule that a voluntary conveyance by one indebted at the time was fraudulent *as a matter of law* towards his creditors. No evidence was allowed to rebut the presumption of fraud. Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 120. This rule was subsequently deemed to be too severe by the courts, and the less stringent rule was adopted that, while a conveyance by a person indebted was presumptively and *prima facie* fraudulent, the presumption might be rebutted by proof to the contrary. Seward v. Jackson, 8 Cow. 406. This presumption, however, is not to be overthrown by mere evidence of good intent or generous impulses or feelings. It must be overcome by circumstances showing on their face that there could have been no bad intent, such as that the gift was a reasonable provision and that the debtor still retained sufficient means to pay his debts. He can no more delay his creditors by such voluntary conveyance than he can actually defraud them." Cole v. Tyler, 65 N. Y. 73, 78.

"To authorize the setting aside of a conveyance as fraudulent, the evidence must show that the grantor, at the time of making it, did not have enough other property subject to execution to pay his debts, and that the conveyance was either without consideration, or that the grantee accepted it with knowledge of the grantor's fraudulent purpose. Pennington v. Flock, 93 Ind. 378. The proof in this case, upon the points above suggested, was unsatisfactory. Fraud is not presumed, but must be proved by the party alleging its existence." Andrews v. Flanagan, 94 Ind. 383.

For citations of many cases on

It is equally well settled, that *a creditor* within the statute of frauds (Code of 1876, § 2124), as to whom a voluntary conveyance is void, is not necessarily one having a demand for money which is due, or running to maturity, or one having an existing cause of action. Whoever has, or may have a claim or demand upon a contract in existence at the time the voluntary conveyance is executed, is a *creditor* within the meaning of the statute. Foote v. Cobb, *supra*. A contingent claim, is as fully protected, as a claim that is certain and absolute. The covenantee of a covenant of general warranty, who is evicted by a title paramount and outstanding at the time the covenant is entered into, is regarded as a *creditor*, not from the time of eviction, but from the time the covenant was executed; and a subsequent voluntary conveyance, is, as to him, void. Gunnard v. Eslava, *supra*.[16]

In the application of the principle that voluntary conveyances are, as matter of law, conclusively presumed fraudulent and void as to existing creditors, the definition of a voluntary conveyance must be steadily kept in view. It is a conveyance founded merely and exclusively on a good, as distinguished from a valuable consideration, on motives of generosity and affection, rather than on a benefit received by the donor, or detriment, trouble, or prejudice to the donee. If the donor receives a benefit, or the donee suffers detriment, as the consideration of the conveyance, the consideration is valuable, not good merely. However inadequate such consideration may be —however trivial the benefit to the one, or the damage to the other, the conveyance is not voluntary. The inadequacy, is a circumstance which with other facts, may impart an actual intent to hinder, delay and defraud the creditors of the grantor, but it does not change the character of the conveyance—does not convert it into a voluntary conveyance. Bump on Fraud. Con. 262. The intent of the party making it, determines its validity or invalidity, whatever may be its form, or the consideration it recites. If he intends *to give*, and the donee accepts with knowledge of the intention, the conveyance is voluntary. If he intends to *sell*, and there is a valuable consideration, the conveyance is not voluntary. The true inquiry therefore is, was the transaction in which the conveyance originates, *a gift*, or

above propositions see Bigelow, Fr. Conv. (Knowlton's ed.) 206, *et seq.*

16—*Cf.* Evans v. Lewis, 30 Oh. St. 11.

a sale. Van Wyck v. Seward, 18 Wend. 386. In this case, a conveyance was made by a father of real estate to his son, requiring the latter to pay his sisters such an amount as the father should decree their portion of his estate. Though the son by accepting the conveyance, became liable to pay the daughters the amount the father should declare, the conveyance was held voluntary. The manifest intent of the donor was to dispose of the lands to and among his children from motives of affection.

After a careful examination of the conveyance made by Freeman, in January, 1859, to Remson, its terms, limitations, and conditions, and a consideration of the cotemporaneous agreement to which it refers, so far as the contents of that agreement are shown by the evidence,—of the relation of the parties, the circumstances surrounding them, when the conveyance was executed, and their subsequent conduct in reference to it, we can discover no substantial ground on which the conveyance can be regarded as *a sale,* and not as *a gift*—as founded on a valuable consideration, and not merely and exclusively on generosity and affection. The element of value, which it is supposed entered into the consideration, freeing the conveyance from the character of voluntary, is that it was made in pursuance of a promise by the donor to give the lands to Remson, if the latter would move from his residence in the county of Talladega, and reside on the lands, cultivating them under the cotemporaneous agreement to which reference has already been made.

It is often a matter of great difficulty, to discern the line which separates promises creating legal obligations, from mere gratuitous agreements. Each case depends so much on its own peculiar facts and circumstances, that it affords but little aid in determining other cases of differing facts. The promise, or agreement, the relation of the parties, the circumstances surrounding them, and their intent, as it may be deduced from these, must determine the inquiry. If the purpose is to confer on the promisee, a benefit from affection and generosity the agreement is gratuitous. If the purpose is to obtain a *quid pro quo*—if there is something to be received, in exchange for which the promise is given, the promise is not gratuitous, but of legal obligation. Erwin v. Erwin, 25 Ala. 241. In Kirksey v. Kirksey, 8 Ala. 131, a brother-in-law, wrote to the widow of his brother, living sixty miles distant, that if she would come and see him, he would let her have a place to raise her family. Shortly after, she broke up and removed to the residence of her

brother-in-law, who for two years furnished her with a comfortable residence, and then required her to give it up. The promise was held gratuitous, though the sister-in-law in consequence of it had sustained the loss and inconvenience of breaking up and moving to the residence of the promisor. In Forward v. Armstead, 12 Ala. 124, a father residing in this state, promised a son residing in North Carolina, to give him a particular plantation in this state, and slaves, if he would remove to and settle upon it. The son was induced by the promise to break up his residence in North Carolina at a loss, and was put to expense and inconvenience in removing to this state. The promise was declared gratuitous, and that the father could not be compelled to perform it specifically. The inconvenience and loss the son sustained, was insisted on as furnishing a valuable consideration for the promise. But the court said: "It seems to us, that the expense incurred in a removal under such inducements, does not furnish the test whether the engagement is to be considered a contract, instead of a gratuity, because expense, or at least trouble, which is equivalent to it, must always be incurred; but as we have before indicated, the test is, whether the thing is to be *paid* in consideration of the removal, instead of being *given* from motives of benevolence, kindness, or natural affection."

The conveyance refers to the cotemporaneous agreement between the donor and the adult, active donee who was free from disability. It is shown that agreement was in writing, and has been lost. Its terms according to the evidence of the donor, and one of the donees, who are the only witnesses speaking of them, were, that Remson should remain on the lands conveyed, and superintend their cultivation, and that of two other plantations, the property of the donor. The fact is not distinctly stated, but it is of necessary inference from the facts stated that each of these three plantations were supplied with hands and every other necessary appliance for cultivation, the property of the donor. To their cultivation, Remson was to contribute no more than his personal services in superintending them. From all three plantations he was to receive one-fifth of the products of cultivation—receiving no more from the cultivation of the lands conveyed, than from the plantations not conveyed. If compensation was intended to be paid him for removing from his home in Talladega to the lands conveyed—for loss and inconvenience sustained in the removal—for personal services

rendered, or to be rendered, it was to be derived from the share of the products of the cultivation of the several plantations, to which the agreement entitled him. We can not regard these as forming part of the consideration of the conveyance of the lands.

When the conveyance was executed, Remson was involved in debt, and the donor was of ample fortune. A relationship existed between them, the donor not having probably nearer relatives than Remson and his family, and none so far as is shown, whose condition appealed more strongly to his sympathy. The conveyance does not vest the right to immediate absolute possession until the death of the donor. At his death it confers on Remson a life estate only, with remainder to his wife if she survives him, and all their children except two, for whom other provision has been made. The wife of the donor joins in the conveyance for the purpose of releasing her contingent right of dower, and the release is expressed to be in consideration of good will and affection borne to said David H. Remson and family. The whole scheme of the conveyance is testamentary. We do not mean to say that it is a will, though it may closely approach it—but it is a disposition by deed from motives of affection, to take effect after the death of the donor. It has all the elements, qualities, limitations and terms to be found in a voluntary conveyance executed by parties sustaining the relations of the parties to it, surrounded by the circumstances surrounding them, and but few, if any, of the elements of a sale between parties contracting on a valuable consideration. We repeat we cannot doubt it was founded on no other consideration than love and affection—that the parties never thought of buying and selling—and that the stress of subsequent and unanticipated events, has induced them to suppose that there was some other consideration for it than affection and benevolence. Without closing our eyes to the truth of the transaction—to the motives we irresistibly feel must have actuated the donor, and to the intent of the parties collected from the circumstances surrounding them, we cannot hesitate to pronounce the conveyance voluntary. It is consequently void as against the appellant.

The decree of the chancellor is reversed and a decree here rendered granting the complainant the relief prayed for. * * *

SHELLEY v. BOOTHE

73 Mo. 74

(Supreme Court of Missouri. October Term, 1880)

NORTON, J. This is an action for the recovery of the possession of a stock of goods, on the trial of which defendant obtained judgment, from which the plaintiffs have appealed. The stock of goods in question had been seized by defendant, Boothe, as sheriff of Jackson county, by the levy of a writ of attachment sued out at the instance of J. W. Wood & Co., creditors of the firm of Woy & Smith, as the property of said Woy & Smith. Plaintiffs, after the goods were thus seized, brought this suit and replevied the goods so levied upon. Plaintiffs base their claim to the goods on the ground that Woy & Smith, before the levy of the attachment sued out by Wood & Co., had transferred the goods in payment of the debts of certain of their creditors, of whom plaintiffs were one, and that under this transfer the goods had been sold and bought by plaintiffs and the proceeds applied to the payment of the debts of Woy & Smith. The defendant, on the other hand, claims that said transfer was made by said Woy & Smith with the intent and for the purpose of hindering, delaying and defrauding said Wood & Co. in the collection of their debt against said Woy & Smith, for the collection of which they had a suit pending at the time of said transfer, and that plaintiffs accepted the goods with knowledge of these facts. The contest is virtually between two creditors of Woy & Smith, and the evidence adduced on the trial tended to establish each one of the above theories, and the only question presented for our determination is, whether the court in giving instructions properly declared the law.

The instructions given on behalf of plaintiffs recognize to the fullest extent the doctrine that the debtor has a clear and undisputed right to prefer one creditor to another, and apply his property to the payment of one set of creditors to the exclusion of other creditors, and when this is done in payment of *bona fide* debts the transaction will be upheld, although in doing so the act of the debtor had the effect, and it was his intention, to defer or hinder another creditor, who at the time had a suit pending against him. While the instructions given on behalf of the plaintiffs covered their theory of the case, those given for defendant, especially the third, which authorized the jury to

find for the defendant if they believed that at the time the goods were transferred, plaintiffs were aware of the fact that it was the intention of Woy & Smith, in making it, to hinder and delay Wood & Co. in the collection of their debt, go farther, we think, than the law warrants. The third instruction is as follows: "If Woy & Smith, in making the conveyance of the goods in suit, intended to delay J. W. Wood & Co., their creditors, and if the plaintiff, either by himself or his agent present at the sale, was aware of such intent, then you will find for the defendant."

There is a class of cases to which the doctrine asserted in the instruction applies; as, if one knowing of judgment and execution against another, goes and purchases his goods in order to defeat the execution, or if one knowing that a debtor is selling his property to hinder, delay or avoid the payment of his debts, buys it, and pays the full value of it, thereby enabling the debtor to carry out his fraudulent design, such sales will be adjudged fraudulent because the purchaser becomes a participant in the iniquitous purpose of the debtor. But cases of this kind should not be confounded with those which only amount to giving a preference of one creditor over another. A debtor may give a preference to a particular creditor or set of creditors by a direct payment or assignment, if he does so in payment of his or their just demands, and not as a mere screen to secure the property to himself. The pendency of another creditor's suit is immaterial, and the transaction is valid though done to defeat that creditor's claim. Kuykendall v. McDonald, 15 Mo. 416; Murray v. Cason, 15 Mo. 415; State v. Benoist, 37 Mo. 500; Bump on Fraud. Con. 350, 351; Potter v. McDowell, 31 Mo. 74. The right of a debtor to prefer one creditor over another necessarily implies the right of such creditor to accept such preference. While the effect of such preference must, to the extent that it is made, necessarily be to defer or to hinder or delay other creditors, the mere knowledge of the preferred creditor that such will be its effect, and the debtor intended it should have that effect, will not be sufficient to avoid the transaction as to a creditor not preferred. But if in such case it further appears from the circumstances attending the transaction that the preferred creditor was not acting from an honest purpose to secure the payment of his own debt, but from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret

interest therein, or in locking it up in any way for the debtor's own use and benefit, he will not be protected, and the sale would be fraudulent as to other creditors, because in such cases the fraud of the debtor becomes the fraud of the preferred creditor because of his participancy therein. Judgment reversed and cause remanded, in which all concur.[17]

BENSON v. BENSON

70 Md. 253, 16 Atl. 657

(Court of Appeals of Maryland. February 8, 1889)

STONE, J. Joseph M. Brian became security on the guardian bond of Thales A. Linthicum, who was the guardian of the complainant, Elizabeth H. Benson, about the year 1868. The said Joseph M. Brian died in 1878, and the guardian, Linthicum, in 1880. The same year in which he died Brian conveyed all his property to his two children, a son and a daughter. Linthicum, the guardian, died insolvent, and, before any final settlement of his guardian accounts, and after his death, it was discovered that he was largely indebted to his ward. It also turned out that the other two securities on the guardian bond were totally insolvent, and Mrs. Benson then filed the bill in this case to set aside the deeds made by Brian to his children as fraudulent and void against her; and whether these deeds are fraudulent and void as against her is the first and most important point in the case.

These deeds were executed by Brian a short time—a few months—before his death. The consideration set forth in the deed to his daughter professed to be love and affection. The consideration set forth in the deed to his son was the sum of $17,000; but the son proves that he did not pay his father a dollar in money, but claims to have paid, subsequently, debts due by his father to *about* that amount. The deed executed by

17—See Dumas v. Clayton, 32 App. Cas. D. C. 566; Jackson v. Citizens Bank & Trust Co., 53 Fla. 265, 44 So. 516; Cron v. Cron, 56 Mich. 8, 22 N. W. 94; Crawford v. Neal, 144 U. S. 585; Griswold v. Szwanek, 82 Neb. 761, 118 N. W. 1073, 21 L. R. A. (N. S.) 222. See also *infra*, Preferences, pp. 247-366.

In re Banks, 207 Fed. 662, the Court held that a payment of one dollar to a creditor whose claim was barred by the statute of limitations did not amount to a fraudulent conveyance, though the payment was made just before going into bankruptcy.

Brian to his daughter was for real estate only, and was executed on the 3d of September, 1878. The deed to his son was executed on the following day, and embraced all the property, both real and personal, of the said Joseph M. Brian, except what he had before given to his daughter.

There is no evidence in the record of the value of the property given to his daughter, but there is evidence of the value of the real estate given to the son, and it seems to have been worth about $40,000, or perhaps a little more. There was a considerable amount of personal property which passed to the son under the deed to him, which, if we understood his evidence correctly, was intended as compensation to the son for services rendered the father. Simultaneous with the execution of these deeds, the father, Joseph M. Brian, entered into a written agreement with his children by which each agreed to pay him, if he demanded it, $500 a year. If he demanded any money from one, he promised to demand an equal amount from the other, so that he might not be a greater burden on one than the other; and all arrears of his annuity were to be considered as paid and settled at the time of his death, so that his personal representative, if any, could make no claim for such arrears.

The recital of these facts shows conclusively the character of this whole transaction. A man advanced in life and of considerable wealth about two months before his death conveys all his property to his children. His son is to pay his debts, and his share was probably for that reason greater by the amount of such debts than his daughter's. The deed to his daughter was confessedly a purely voluntary conveyance, and the deed to the son, upon the proof, is also a voluntary conveyance. The son did not pay a dollar for the property. All he professes to have done was to pay some debts of the father, not amounting at most to half the value of the real estate alone that he got. It needs no authority for so plain a proposition that the son was not, under these circumstances, a purchaser for a valuable consideration, and to be treated as such. The deeds, the agreement, and the proof show that Mr. Brian's object was to divide his property between his children in his life-time, retaining only an annuity sufficient for his wants for his life.

There is nothing in this record to show that Mr. Brian contemplated any fraud whatever. He may not, and probably did not, apprehend any loss on account of his being on this guardian bond; but, whether he did or did not, these deeds cannot avail

against the claim of these complainants, and must be declared, as against them, fraudulent and void. To hold otherwise would be to declare that an obligor on a bond might always relieve himself when loss was apprehended by giving his property to his wife or child. * * *

We are therefore of opinion that the proceeds of the sale were properly in the hands of the guardian, and that his security is liable therefor. While, as we have said, the deeds, the subject of controversy here, are void against the claims of the complaining creditors, and the property must be sold if necessary to pay them, yet it is proper to state that Joseph M. Brian, Jr., is entitled out of the proceeds of the property that he received from his father, if such sale should be made, to be allowed a credit for all the debts due *bona fide* from his father, and which he can show that he paid after he received a deed for the property. The decree must be reversed, and the case remanded, that a decree may be entered in conformity with this opinion.[18]

BALDWIN v. SHORT

125 N. Y. 553, 26 N. E. 928

(Court of Appeals of New York. February 24, 1891)

FINCH, J. The findings of fact in this case establish that the conveyance of the house and lot to Mrs. Short by Mrs. Sperry was made and accepted with an intent on the part of both grantee and grantor to hinder, delay, and defraud the creditors of the latter. The conveyance was not voluntary, for it was made in part in consideration of a debt of about $8,000 which the findings show was an honest debt, and justly due to the grantee from the grantor. The conclusion of a fraudulent intent on the part of Mrs. Short was therefore essential to a recovery, and was established by proof that the balance of the consideration for the transfer was made up of a false and pretended debt for board and washing, which was wholly fictitious, and never in fact existed, and which both parties to the transaction falsely concocted to make up a full and fair consideration for the conveyance. The existence or the falsity of that indebtedness was therefore an essential and vital element in the

18—For references to many cases in accord see 20 Cyc. 421. *Cf.* Ex parte Mercer, 12 Q. B. D. 290.

controversy; and the appellants claim that, in the effort to show it to have been a fabrication, evidence was admitted against Mrs. Short of declarations made by Mrs. Sperry, at a period preceding the conveyance, which bore directly upon the validity of the disputed debt, and were inadmissible as against Mrs. Short. Mrs. Parker, a witness for the plaintiff, was permitted to testify that, just prior to the assignment, she had a conversation with Mrs. Sperry, in the absence of Mrs. Short, in the course of which Mrs. Sperry said: "I think I shall sell this house. It costs so much to keep it up just for Mary's and my board." The defendants had asserted that such board was an honest debt due to Mrs. Short from her mother; and the plaintiff, that it was paid and extinguished as it accrued by the rent of the house, and that by agreement the board was to be furnished in exchange for the rent which would otherwise have been due from Mrs. Short on account of her occupation. The declaration sworn to by Mrs. Parker tended to show the truth of plaintiff's contention, but was made in the absence of Mrs. Short, constituted no part of the *res gestæ*, and was inadmissible as against the grantee, in whose behalf the objection was made. But it is a conclusive answer to this allegation of error that Mrs. Short herself, when examined as a witness, admitted all and more than what the objectionable evidence tended to prove. She acknowledged that during her occupation of the house her mother paid all the taxes and insurance, and almost all the charges for repairs; and further testified: "I don't remember saying to Mrs. Sherwood that I boarded my mother and Mary for the rent of the house; did their washing; that, while I thought a great deal of my sister, I thought it was hard I should pay the rent, and that my sister should receive it. I would not say I didn't. I don't remember. I don't know when I said it. That was the arrangement under which I was in the house." She said again, at a later period of her examination: "I had loaned my mother this money. I boarded her and my sister, and did their washing, for this house,—for the rent of the house. * * * I was not to pay any rent, only in that way,—only to board them in that way, and do their washing. That was to pay my rent. And that arrangement continued down to the time I received my deed." Of course, these admissions made the declarations to Mrs. Parker wholly superfluous and immaterial. Mrs. Parker was also permitted to narrate other declarations of Mrs. Sperry, made prior to the conveyance, under

objection. These were, in substance, that it was preposterous to suggest that she should make presents to her daughters because they took care of her when she was sick; that they only did their duty. In answer to the objection interposed in behalf of Mrs. Short, the court held the declarations not competent, but, to accommodate the witness, allowed them to be detailed, conditioned upon their being stricken out if not made competent. In the further progress of the trial, both Mrs. Short and Mrs. Sperry testified to the transfer to the former by the latter of some "ranch stock" a few months before the assignment, and added that it was done as remuneration for the services rendered during Mrs. Sperry's sickness. The declarations sworn to by the witness tended to show that the mother did not regard the services of her daughters during her illness as constituting a debt which she was in any manner bound to repay; and that is the sole element of value in the proof. But exactly that, Mrs. Short herself finally admitted. She said expressly that for her services in the illness referred to she neither asked nor expected any pay; that the transfer of the ranch stock was a present; that it was given to her, and so constituted a gift, rather than a purchase. If it be still suggested that the declaration proved showed an existing unwillingness to make her a present, the fact was both immaterial and harmless; for the admitted delay of at least eight years shows the same thing much more forcibly, and leaves no doubt about the suggested lack of inclination.

But another class of evidence was received under objection. The plaintiff proved several instances of transfers of property by Mrs. Sperry to persons other than Mrs. Short prior to the conveyance to the latter; and it was objected in her behalf that she could not be affected by transactions to which she was not a party, and of which she had no knowledge. But the plaintiff was bound to prove the fraudulent intent of Mrs. Sperry, both as against herself and as against Mrs. Short, and as against the latter by evidence competent as against her. The acts and transfers of Mrs. Sperry pertinent to the question of her intent were admissible against both to establish that intent, and are not to be excluded because they do not also bear upon the intent of Mrs. Short. It is not necessary that the same fact offered in evidence should tend to establish both intents. If it proved Mrs. Sperry's alone, but was a kind of evidence competent against Mrs. Short, no error would follow its admission. It

would tend to prove one branch of the issue, leaving the other to be met in some different way.

There are some other objections to evidence, but of so little importance as not to justify discussion. They related principally to the declarations of Mrs. Sperry on the day of the assignment and conveyance, and pending the preparation of those instruments, and were either within the *res gestæ*, or wholly immaterial, in view of the ultimate course of the trial.

The contention that the conveyance to Mrs. Short may be sustained to the extent of the adequate and honest part of the consideration is fully answered by the authorities which hold that, where the deed is fraudulent against creditors, it is wholly void, and cannot stand to any extent as security or indemnity. Boyd v. Dunlap, 1 Johns. Ch. 478; Dewey v. Moyer, 72 N. Y. 70; Billings v. Russell, 101 N. Y. 226, 4 N. E. Rep. 531. A different rule would put a premium upon fraud. Almost invariably, some honest consideration is made the agency for floating a scheme of fraud against creditors; and, if that may always be saved, nothing is lost by the effort, and the temptation to venture it is increased. We are thus unable to find in the record any error which will justify a reversal. Indeed, since the ground of recovery against the defendants rests almost wholly upon the single fact of a false and fraudulent consideration fabricated by the joint act of both grantor and grantee, and distinctly admitted by each to have been without an honest foundation, the questions of evidence raised can hardly be said to have affected the ultimate result. The judgment should be affirmed, with costs. All concur, except Ruger, C. J., and Andrews, J., not voting.[19]

19—For many cases in accord, see 20 Cyc. 638.

"I do not discover, from a view of the pleadings and proofs, such traces of actual and direct fraud as to feel myself warranted in directing the conveyance of the real estate to be delivered up and cancelled as absolutely null and void. * * * The only question with me has been whether the plaintiffs ought to be left to their legal remedy, or whether the case affords sufficient ground for a limited interference by allowing the deed of the real estate to stand as a security only for such consideration as has been shown by the younger Dunlap. There appears to be very considerable inadequacy of price, even admitting the consideration expressed in the deed; and to allow the deed to stand as security only for the true sum due would be doing justice to the parties, and granting a relief which cannot be afforded at law. A court of law can hold no middle course. The entire claim of each

WILSON v. WALRATH

103 Minn. 412, 115 N. W. 203

(Supreme Court of Minnesota. February 21, 1908)

ELLIOTT, J. This was an action in replevin, in which the plaintiff sought to recover possession of an automobile. The case was tried by the court without a jury, and findings of fact and conclusions of law were made in favor of the defendant. From the judgment entered thereon the plaintiff appealed to this court.

The principal facts are undisputed. The ultimate conclusion only is questioned. If the findings of facts are sustained by the evidence, the conclusions of law were properly drawn. One Spargo sold the automobile in question to the appellant, Wilson, who paid full consideration therefor, but agreed to allow Spargo to retain possession of the property for certain purposes and under certain conditions for a specified time. While in possession, Spargo mortgaged the machine to Walrath, who had no knowledge of the sale to Wilson. The court found as a fact that the evidence does not prove that the sale to Wilson "was made in good faith and without intent to injure, delay, or defraud creditors and subsequent purchasers in good faith of said Spargo." If the evidence sustains this finding of fact, the respondent must prevail in this court.

party must rest and be determined at law on the single point of the validity of the deed; but it is an ordinary case, in this court, that a deed, though not absolutely void, yet, if obtained under unequitable circumstances, should stand only as a security for the sum really due. * * * A deed fraudulent in fact is absolutely void, and it is not permitted to stand as a security, for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or unequitable circumstances, or which is only constructively fraudulent. * * * Nothing can be more equitable than this mode of dealing with these conveyances of such indecisive and dubious aspect that they cannot either be entirely suppressed or entirely supported with satisfaction and safety." Chancellor Kent, in Boyd v. Dunlap, 1 Johns. Ch. 478; Clark v. Sherman, 128 Iowa, 353, 103 N. W. 982; Griswold v. Szwanek, 82 Neb. 761, 118 N. W. 1073, 21 L. R. A. (N. S.) 222; Horton v. Bamford, 79 N. J. Eq. 356, 81 Atl. 761; McGovern v. Motor Co., 141 Wis. 309, 124 N. W. 269; Pringle v. Olshinetsky, 17 Ont. L. R. 38, 11 Ont. W. R. 871.

See Dickinson v. Way, 3 Rich. Eq. 412; Johnston v. Bank, 3 Strobh. Eq. 263; Robinson v. Stewart, 10 N. Y. 189.

1. There is a line of cases which holds that, while delivery is not essential to pass title as between the vendor and vendee of personal property, it is necessary for such purpose as against every one but the vendor. Under this rule, when the same goods are sold to different persons by conveyances equally valid, he who first lawfully acquires the possession will hold them as against the other. The motives and intentions of the parties are immaterial, as the doctrine rests upon the general principle that, where one of two innocent persons must suffer, the loss should fall on him whose acts or omissions have made or contributed to make the loss possible. Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119; Crawford v. Forristall, 58 N. H. 114; Burnell v. Robertson, 10 Ill. 282; Stephens v. Gifford, 137 Pa. 219, 20 Atl. 542, 21 Am. St. Rep. 868; Norton v. Doolittle, 32 Conn. 405. For other cases see 2 Mechem on Sales, § 981. Closely connected with this doctrine, but resting on other principles, is the rule which makes the retention of possession by the vendor conclusive evidence of fraud. This doctrine also rests upon grounds of assumed public policy. It prevails by virtue of statutes or decisions based on the common law in a number of states. 2 Mechem on Sales, § 984; 20 Cyc. 539, note 13.[20] In the greater number of states, however, the rule is established that the mere retention of possession by the vendor is presumptive evidence only of a fraudulent and colorable sale, and the vendee is permitted to overthrow this presumption by evidence which establishes his good faith and want of knowledge of any fraudulent intent on the part of the vendor. 20 Cyc.

20—See the extensive note in 24 L. R. A. (N. S.) 1127-1154, where the cases and statutes are collected.

The matter of whether the retention of possession is consistent with the deed or not has been deemed in some cases to have been of importance. Hopkins v. Scott, 20 Ala. 179; Hempstead v. Johnston, 18 Ark. 123; Clayton v. Brown, 17 Ga. 217; Bass v. Pease, 79 Ill. App. 308; Edwards v. Harben, 2 T. R. 587; Martindale v. Booth, 3 B. & A. 498. In Bass v. Pease, *supra*, the Court said: "Ever since the case of Thornton v. Davenport, 1 Scam. 296, the rule has been, in Illinois, that all absolute sales of chattel property, where possession is permitted to remain with the vendor, are fraudulent *per se*, and void as to creditors and purchasers, unless the retention of possession by the vendor is consistent with the provisions of the deed of transfer or bill of sale. In all such cases the vendor's possession is not merely evidence of fraud, but, by legal inference, is fraud in itself, and can not be rebutted although the parties may have acted in the best of faith." But see Clow v. Woods, 5 S. & R. 275; also Bigelow on Fr. Conv. (Knowlton's ed.) 404, *et seq.*

536 *et seq.* The statutes are referred to in the notes to 2 Mechem on Sales, §§ 960, 961.

2. In the thirteenth year of Elizabeth there was enacted the famous statute which made all conveyances not made *bona fide* and for value, with intent to injure and delay or defraud the creditors, void as to such creditors. St. 13 Eliz. c. 5. A later statute extended this protection to subsequent purchasers as well as creditors. St. 27 Eliz. c. 4. These statutes did not in terms apply to personal property, but from the time of Sir Edward Coke's decision in Twyne's Case, 3 Co. Rep. 80b, 5 Eng. Rul. Cas. 2, sales of personal property made with intent to delay and defraud creditors or subsequent purchasers have been regarded as within the provisions of the statutes. The question soon arose whether, under these statutes, possession by the vendor was fraudulent *per se,* and therefore conclusive, or merely presumptively fraudulent. In Twyne's Case, in speaking of the indicia of fraud, it was said that "continuance of the possession in the donor is the sign of trust for himself." In Edwards v. Harben, 2 T. R. 587, it was held that, "if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent." For some time thereafter this was the established rule in the English courts, but it was finally held that the proper construction of the statute made such a conveyance presumptively fraudulent only. Hale v. Metropolitan Co., 28 L. J. Ch. 777; Gregg v. Holland, [1902] 2 Ch. 360. To clear up the difficulty which arose under the statute, Parliament enacted the various bills of sale acts, which are fully discussed and explained by Lord Blackburn in Cookson v. Swire, 9 A. C. 653-670 (1884). See, also, references to these acts and decisions thereunder in notes to the fifth English edition of Benjamin on Sales, p. 496, and appendix, p. 1029, and in the note to Twyne's Case in 5 Eng. Rul. Cas. 27-39. See, also, Mr. Bennett's note to the sixth American edition of Benjamin on Sales, pp. 458-462, and Jones on Chattel Mortgages, § 320 *et seq.* In the United States Edwards v. Harben was followed by Chancellor Kent in Sturtevant v. Ballard, 9 Johns. (N. Y.) 337, 6 Am. Dec. 281, and by the Supreme Court of the United States in Hamilton v. Russell, 1 Cranch (U. S.) 309, 2 L. ed. 118. But in Warner v. Norton, 20 How. (U. S.) 448, 15 L. ed. 950, Mr. Justice McLean stated that "for many years past the tendency has been in England and the United States to consider the question of fraud as a fact for the jury under

the instruction of the court." This is now the established doctrine of the court. Jewell v. Knight, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. ed. 190; Smith v. Craft, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. ed. 267. See note 18 L. R. A. 604.[21]

§ 3496, Rev. Laws 1905, and the previous statutes which are embodied therein, were enacted for the purpose of removing any doubts as to whether the retention of possession by the vendor is conclusive or only presumptive evidence of fraud. It provides in express terms that such possession shall be presumed to be fraudulent and void as against subsequent purchasers in good faith, unless those claiming under such sale make it appear that the sale was made in good faith and without any intent to defraud such purchasers. The effect is to cast upon the vendee the burden of rebutting the statutory presumption of fraudulent intent by proving his own good faith and want of knowledge of fraudulent intent on the part of the vendor. Leqve v. Smith, 63 Minn. 24, 65 N. W. 121. The statute controls this case. If Wilson proved that he purchased the machine in good faith without knowledge of any intent on the part of Spargo to defraud his creditors or subsequent purchasers, he was entitled to the possession of the property. It is conceded that on April 5, 1906, Spargo owed Wilson $250, the proceeds of an old machine which had been sold by Spargo for Wilson. The money had been retained for some time with the consent of Wilson. Spargo then owned a Jackson machine, which he used for demonstrating purposes. Wilson wished to purchase a new machine, and after various negotiations he purchased the Jackson machine for $1,000, which was substantially its actual value. In payment he at the time gave Spargo $700 in cash and satisfied the debt for $250 and accumulated interest. Wilson was interested in country banks, and his business called him away from home a great deal of the time. It was necessary that the machine should be stored in some garage. Spargo, being agent for the Jackson automobile, and having no other machine of that make on hand, wished to retain possession of this machine for a time and use it for demonstrating purposes. It was therefore agreed and stated in the bill of sale that Spargo might retain possession of the machine for 30 days and in the meantime use it for demonstrative purposes, in consideration of which

21—Federal courts, however, will follow the law of the state properly applicable. Etheridge v. Sperry, 139 U. S. 266, 277.

he was to store the machine and keep it in repair. Spargo's business and personal standing was good, and Wilson had no reason to suspect, and did not suspect, that Spargo was insolvent. It appears from all the evidence that if he had made special investigations he would have found that Spargo's standing was good. Spargo kept the machine in his garage after the expiration of the 30 days and continued to use it in his business. During this time he mortgaged it to the respondent, Walrath, who had no knowledge of the previous sale to Wilson and acquired his lien in good faith for value. Neither Wilson's bill of sale nor Walrath's mortgage was recorded. Walrath finally took possession of the machine, and in this action Wilson sought to recover possession from him.

A careful examination of the evidence compels the conclusion that Wilson was entitled to a finding of fact to the effect that he purchased the automobile in good faith and without any intent to hinder, delay, or defraud Spargo's creditors, or subsequent purchasers from Spargo. Wilson certainly acted in good faith in the matter, if such a thing is possible when the vendor is allowed to retain possession of the chattel. He paid full value for the property, and this in itself is persuasive evidence of his good faith. The respondent says that the appellant was not prejudiced by reason of his absence from the trial, "because no one disputed his good faith in buying the automobile." It is not contended that there was any actual bad faith on the part of Wilson. In his brief the respondent thus states his position. The sale was not accompanied with immediate delivery and followed by an open and continuous change of possession, within the meaning of § 3496, Rev. Laws 1905; and hence, "while in this case it may be true that on April 25, 1906, appellant in the utmost good faith purchased the automobile, but from that time on the action of the appellant in permitting and agreeing to allow Mr. Spargo, the vendor, to keep and use that machine in exactly the same manner after the sale as before, was a fraud *per se* upon any person who might either purchase or take the same as security without notice of the rights of a prior purchaser." This is the doctrine of Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119, and the other cases of the group to which reference has been made. As an abstract principle of law, that doctrine is sound and controlling when applied to appropriate facts and conditions. But the effect which shall be given to possession under the particular circumstances disclosed in this rec-

ord is declared by the statute, and the statute should not be disregarded and annulled by the application of the doctrine of equitable estoppel. Upon the evidence Wilson sustained the burden which the statute imposes upon him, and the finding of the trial court was thus erroneous.

We are inclined to believe that the court was misled by certain statements made in the case of Flanigan v. Pomeroy, 85 Minn. 264, 88 N. W. 761, which approve the doctrine of Lanfear v. Sumner. In that case it appeared that Hogan was the owner of a horse which he desired to sell. Flanigan agreed to pay $350 for the horse, and paid $10 on account, with the understanding that he should pay the balance before 11 o'clock the next day and then get the horse. Before the time had elapsed Boynton offered to purchase the horse from Hogan, and was informed that another party had an option which expired at 11 o'clock. Flanigan failed to appear within the time limit, and Hogan sold the horse to Boynton, who paid the purchase price in full and took possession of the property. Flanigan, claiming that the title of the horse passed to him at the time of the payment of the $10, brought an action in replevin and was defeated. The trial court did not make a finding that Flanigan was a purchaser in good faith, and, as this was necessary to his right to recover, the order was properly affirmed on that ground. As an additional reason why Boynton was entitled to retain possession of the horse, the court referred with approval to the doctrine of Lanfear v. Sumner, and cited certain cases in which that doctrine has been approved. The case was properly decided upon the first ground stated, and the additional reason given in the opinion must be regarded as no longer meeting with the approval of this court.

The judgment is therefore reversed, and a new trial granted.

FORD LUMBER & MFG. CO. v. CURD

150 Ky. 738, 150 S. W. 991

(Court of Appeals of Kentucky. November 26, 1912)

CARROLL, J. This suit was brought by the appellant company to subject to the payment of a debt it had against the appellee John P. Curd a house and lot conveyed to the appellee Anna Curd, his wife, upon the ground that the conveyance was fraudulent and made for the purpose of defeating the collection

of its debt. The lower court dismissed the suit, and to reverse that judgment this appeal is prosecuted.

The debt sued on by the appellant was created by John P. Curd some time prior to February 10, 1908, on which date he executed to the company his note for the amount due. In August, 1908, the property sought to be subjected was conveyed to Anna Curd; the consideration being $1,150. Of this amount, $100, perhaps something over, was paid on the consideration of the vendor, and a few days after the conveyance was made the Home & Savings Fund Company advanced to the Curds about $1,000, to satisfy the remainder due on the purchase price and took a mortgage on the property. At the time, or perhaps before, this transaction occurred, John P. Curd had become a member of this Home & Savings Fund Company, the dues in which were $2.30 a week, and the purpose of obtaining the money from the Home & Savings Fund Company was to enable the Curds to pay off the mortgage debt in weekly installments. The evidence shows that the first payment, of about $100, made to the vendor, was paid out of money that Mrs. Curd had received from the estate of her parents; but the weekly payments of $2.30 to the Home & Savings Fund Company were paid by Mrs. Curd out of money given to her by her husband. The evidence further shows that Curd earned, from August, 1908, to August, 1911, when the suit was brought, about $20 a week, and that he gave the money so earned to his wife, who, with this money, in addition to $4 a week received from a boarder, paid all the expenses of the house and family, which consisted of herself and husband and two children, and was able to save out of it a few dollars each week. It is also shown that she was an industrious, thrifty, economical woman, and that she did the cooking for the family and all the household work, except occasionally when she had a young girl to help her.

On these facts it is the contention of counsel for appellant that as the weekly payments made on the house were, in fact, made by Curd out of money earned by him, the property should be subjected to the debt sued on; while counsel for appellee insist that Curd had the legal right to give to his wife, for the support of his family, the wages he received, and if she saved enough out of this to pay the weekly dues to the Home & Savings Fund Company, thus reducing the debt against the house, no fraud was practiced on the appellant, and it cannot subject the

property to the extent of the payments so made in satisfaction of its debt.

As the evidence shows that Mrs. Curd paid, out of her own money, the initial payment on the property, there is, of course, no fraud attached to this feature of the case, and we may put it aside without further comment. The remaining question is: Does the fact that the property was conveyed to Mrs. Curd, and the weekly payments made out of money earned by her husband and given to her, constitute such fraud, in the meaning of the law, as would authorize the court to subject the property to appellant's debt to the extent of the weekly payments? We think this question must be answered in the negative, as it was by the lower court.

The cases of Gross v. Eddinger, 85 Ky. 168, 3 S. W. 1, 8 Ky. Law Rep. 829; Brooks-Waterfield Co. v. Frisbie, 99 Ky. 125, 35 S. W. 106, 18 Ky. Law Rep. 555, 59 Am. St. Rep. 452; Blackburn v. Thompson, Wilson & Co., 66 S. W. 5, 23 Ky. Law Rep. 1723, 56 L. R. A. 938; and Patton v. Smith, 130 Ky. 819, 114 S. W. 315, 23 L. R. A. (N. S.) 1124—relied on by counsel for appellant, do not, in our opinion, support his contention that the appellant should succeed in this case. We approve of those opinions and the principles of law announced in them; but they are plainly distinguishable from the case at bar. In the Gross case the husband, by his exclusive business effort, accumulated in a few years $3,000 or $4,000, which was invested in the name of his wife, and the court held, under the facts of that case, it was plainly the purpose of the husband to defraud his creditors by attempting to place the income from a profitable business, conducted by him, in the name of his wife and beyond their reach. In the Brooks-Waterfield case, Frisbie, who was a successful and prosperous business man, accumulated several thousand dollars, in the course of a few years, and invested it in real estate in the name of his wife, and the court subjected, at the instance of his creditors, the property in the name of his wife, to the extent of $3,000 to the payment of his debts. In the Blackburn case, the husband, who was conducting a profitable line of business, invested, in the name of his wife, some $2,500 realized from his business, and the court held that the scheme of permitting his wife to take the title to property that was paid for in this way by the husband was a fraud upon his creditors.

In the Patton case the husband, in a few years, by industry and business ability, accumulated several thousand dollars, with which land was bought and the title taken in the name of the wife, and it was held that the husband could not, by this method, defeat the claims of his creditors, and so much of the property as represented the result of his business capacity was subjected to the payment of his debts. In all of these cases it appeared that the earnings or profits made by the husband were greatly in excess of the amount necessary to comfortably provide a home and support for his family, and the court in substance said that a husband engaged in a successful and prosperous business, by which he was able to accumulate considerable estate, would not be permitted to invest his accumulations in property in the name of his wife, and thus defeat his creditors. But we have here a very different state of case. Curd, with a wife and two children to support, was earning a salary of $20 a week, or $80 a month, not more than sufficient to provide for and support his family, if his wife had not been an industrious, economical, good housekeeper. If, in place of handing to his wife every week all of his meager salary, Curd had seen proper, as many husbands do, to spend a part of the money in purchasing pleasures and comforts for himself and family, or if he had given the money to his wife and she had spent it, as many wives do, in extravagant living, his creditors could not have reached any part of it, because he would have been entitled to the $20 received each week, under the exemption laws of the state. But even if it was not so exempt, no court would have compelled him to set aside, out of this salary, a certain sum each week for the benefit of his creditors, or have required him to live more economically than he desired to, and in this way save a portion of his wages for his creditors.

Where the earnings of the husband are not more than reasonably sufficient to comfortably provide for and support his family, hire household labor, and furnish his wife and children with some of the pleasures of life, he may give his earnings to his wife, and if she is willing to deny herself the pleasures and little luxuries that she might have, and to dress plainly and live frugally, and do her own cooking and household work in place of hiring help to do it, and by this close economy in the management of her personal and household affairs is able to save enough

to buy an humble home, his creditors cannot take it from her. Anderson v. Mundo, 77 S. W. 926, 25 Ky. Law Rep. 1644.

The judgment dismissing the petition is affirmed.[22]

LYNCH'S ADM'R v. MURRAY

86 Vt. 1, 83 Atl. 746

(Supreme Court of Vermont. May 14, 1912)

HASELTON, J. This is a bill in chancery brought by the administrator *de bonis non* of the estate of Thomas Lynch. The bill is founded on P. S. 2863, which authorizes an executor or administrator, where there is a deficiency of assets, to maintain a suit to set aside a fraudulent conveyance made by the deceased person whom he represents. The conveyance in question was made by Thomas Lynch to William Murray, the defendant, June 20, 1898. The case was heard on bill, answer, master's report, and defendant's exceptions thereto, and on the defendant's motion for a decree in his favor, and it was decreed that the conveyance in question is void as to the creditors of Lynch and of his estate to the extent of the deficiency of the assets of the estate to pay such creditors. There were further provisions in the decree the propriety of which, except as herein noticed, is not questioned, provided the decree, so far as above recited, was rightly made. The decree is in substantial conformity with that directed by this court in its mandate in the well-considered case of McLane v. Johnson, 43 Vt. 48. Murray, the defendant, appeals.

It is claimed by Murray that it does not appear by the report that the conveyance to him was made with an actual fraudulent intent on the part of Lynch. It appears from the report that Lynch had owned and occupied the farm for about 10 years before the conveyance in question and that during most of that time, a period of about 10 years, he had kept in his family one McCabe, who had left shortly before the conveyance, and who claimed that there was due to him from Lynch a large sum on account of labor done by the former for the latter; that McCabe threatened to bring suit on such claim; that Lynch hearing of the threatened, or contemplated, action of McCabe consulted his

22—*Cf.* Trefethen v. Lyman, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190; Robinson v. McKenna, 21 R. I. 117, 42 Atl. 510, 79 Am. St. Rep. 793.

close friend Murray as to what should be done under the circumstances; and that the two called upon a third person to draw the deed in question; and that, after it had been properly executed, Lynch delivered it to Murray, and Murray took it and had it recorded. The farm was then worth $1,800. It was unincumbered except by a mortgage of $600. There was no consideration for the deed of Lynch's equity of redemption, but Murray assumed the comparatively small mortgage. Lynch believed that he had more than paid McCabe and that the latter's claim was unfounded and unjust, but feared that the latter might obtain a large judgment on his claim, and he gave the deed for the purpose of so transferring the apparent title to the property that it could not be reached in execution by McCabe. Lynch told Murray that McCabe had been more than paid, and it was agreed between Lynch and Murray at the time of the giving of the deed that on settlement of the McCabe claim the property should be deeded back to Lynch.

The master does not in terms find that the conveyance was fraudulent, but the facts found as above stated are equivalent to a finding that the conveyance was actually fraudulent; for, as has well been said, actual fraud means "fraud according to the common conscience." And it is that conscience, and not Lynch's or Murray's, which determines the character of this conveyance. Bigelow, Fraudulent Conveyances (Knowlton's ed.) 1, 444. Even though Lynch did not believe that he owed McCabe, it was the latter's right, if he thought otherwise, to bring suit and have his rights determined, not by the judgment of Lynch, but by the judgment of the court, and it was the duty of Lynch, so far as his property not exempt would enable him, to satisfy any such judgment, and so the conveyance was made with the fraudulent intent of defeating the right of McCabe and of avoiding the duty of Lynch, and was an actual fraud upon one who, as was contemplated, might become a judgment creditor in consequence of claims existing at the time of the conveyance. Foster v. Foster, 56 Vt. 540; Corey v. Morrill, 71 Vt. 51, 42 Atl. 976; Kimball v. Thompson, 4 Cush. 441, 447, 50 Am. Dec. 799; Rogers v. Evans, 3 Ind. 574, 56 Am. Dec. 537.

With great good sense, the Statute of Elizabeth counted as fraudulent conveyances which tended "to the let or hindrance of the due course and execution of law and justice." 13 Eliz. c. 5, cl. 1.

To say that fears of an unjust judgment against Lynch af-

fected the character of the transaction would be much like saying that a mob is justified in hanging or burning one charged with crime because of apprehensions that a court of law will unjustly acquit him.

It is further claimed by Murray that there is no finding in the report that he had any fraudulent intent in taking the deed, and that he must be considered as an innocent grantee. But the facts above stated permit but one conclusion; that is, that he was in collusion with Lynch; that he took the deed in furtherance of the fraudulent intent of Lynch and for the purpose of effectuating it. It is therefore to be presumed that the trial court drew that conclusion. Davenport v. Crowell, 79 Vt. 419, 65 Atl. 557; Johnson v. Paine, 84 Vt. 84, 78 Atl. 732; Perkins v. Perley, 82 Vt. 524, 74 Atl. 231.

We have then a case of a conveyance given by the grantor and taken by the grantee with the actual fraudulent intent on the part of both of defeating such existing claim, if any, as McCabe might succeed in establishing through regular proceedings in a court of justice.

The defendant claims that this was not a voluntary conveyance, on the ground that Murray assumed to pay the mortgage on the farm. As we have seen, the farm at the time of the conveyance was worth $1,800, the mortgage was $600, and nothing was paid for the valuable equity of redemption. This could be levied upon by creditors, and its alienation without consideration was within the statute. The circumstance of the assumption of the mortgage, and other circumstances connected therewith, do not tend to relieve the transaction of its fraudulent character in view of the fact that it was agreed between the parties that, when the McCabe claim was put out of the way, the property should be deeded back to Lynch. In view of that agreement, the assumption of the mortgage seems to have been intended rather to give a fair aspect to the fraud than to make the transaction *bona fide*. Bigelow, Fraudulent Conveyances (Knowlton's ed.) 39, 122; Spencer v. Caverhill (Iowa) 133 N. W. 450, 453; First National Bank v. Bertschy, 52 Wis. 438, 9 N. W. 534; Lyons v. Haddock, 59 Iowa, 682, 13 N. W. 737; Randall v. Vroom, 30 N. J. Eq. 353; Stutson v. Brown, 7 Cow. 732; Welcome v. Batchelder, 23 Me. 85.

* * *

Decree affirmed and cause remanded.

HOLLOWAY v. MILLARD

1 Madd. 225

(Chancery. February 25-March 4, 1816)

This was a creditor's bill, filed against the executors of S. H. and also against the trustees, and *cestuis que trust,* under a voluntary settlement made by her, praying an account against the executors; and that if it should appear that her estate was insufficient for the payment of her debts, the deficiency might be made good out of the property of which the voluntary settlement had been made, and that a competent part might be sold for that purpose.

S. H. by her will, 29th April, 1809, gave all her real estate, etc., to the use of M. Lewis (since deceased), and the defendant, John Millard, their heirs and assigns, in trust to sell the same, and apply the produce in aid of her personal estate, in discharge of her debts, etc., and gave the residue to F. T. Lewis and Millard were appointed executors.

By a settlement, dated 22nd of December, 1810, S. H., after reciting that she was entitled as one of four co-heiresses to a fourth part of certain estates, estimated at the value of £170,000, parts of which estate had been contracted to be sold, she covenanted and agreed with the trustees Lewis and Millard, that, out of her share of the monies to be produced by the sale of the estates, she would pay them £36,000 sterling, upon trust, to invest the same in government securities, and apply the dividends as she should appoint, and for want of appointment to pay the same to her for her life, and after her decease, then upon the trusts mentioned in the deed, in favor of the defendants, the *cestuis que trust.* By a codicil, 5th March, 1811, S. H. confirmed her will, and the settlement. The £36,000 was afterwards paid to the trustees, and they invested the same in government securities, and applied the dividends and the principal according to the trusts of the settlement.

The bill did not state that the deceased was indebted at the time she made the voluntary settlement; but charged that it was made in favor of an illegitimate child, and others, and that the whole was voluntary, and made without good or valuable consideration, and void against the plaintiffs, who were creditors subsequent to the settlement.

THE VICE-CHANCELLOR. Two questions have been made in this cause; 1st. Whether a voluntary settlement by one not indebted, in favor of an illegitimate child, and others, can be impeached by creditors subsequent to the settlement; and 2dly. Whether the plaintiff, though he has not stated in his bill that the settler was indebted when she made the settlement, is entitled to an inquiry as to that fact, the bill being a creditor's bill.

With respect to the first point, it appears, that S. H. being entitled to £42,500, makes a settlement to the extent of £36,000. It is a pure voluntary settlement in favor of strangers (for the illegitimate child cannot be considered otherwise than as a stranger), without pecuniary consideration, or consideration of blood, by one not indebted at the time. It has been strongly insisted that, though a voluntary settlement by one not indebted, is good against future creditors, if made in favor of a wife or child; yet, that if made in favor of strangers, as in this case, it is not effectual against future creditors.

It was not from any doubt on this point, but only from its general importance, and in deference to the argument, that I thought it right to look into the cases.

Let us first see how it stands independent of authority. The word *"voluntary"* is not to be found either in the statute of the 13th Eliz. c. 5 (upon which the present question arises), or in the 27th Eliz. c. 4. The 13th Eliz. is pointed only against *"fraudulent"* conveyances, as appears from the preamble; and such conveyances only are thereby invalidated. Fraudulent conveyances are such, to use the words of the preamble, as are "devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay, hinder, or defraud creditors." This conveyance is not one of that description. It is not fraudulent merely because it is voluntary. A voluntary conveyance may be made of real or personal property, without any consideration whatever, and cannot be avoided by subsequent creditors, unless it be of the description mentioned in the statute. If a person having £1,000 a year, and not indebted at the time, gives away £500 a year, the gift is not fraudulent, unless it were made with an intent to defeat subsequent creditors. Its being voluntary is *prima facie* evidence, where the party is loaded with debt at the time, of an intent to defeat and defraud his creditors; but if unindebted, his disposition is good. There is no suggestion in the bill that this settler was indebted at the

time; she was not in trade; and the settlement did not include all her property; £6,000 being left unsettled. She was culpable in becoming the parent of such a child, but the child being born, it was her duty to protect and provide for it. A voluntary disposition, even in favor of a child, is not good, if the party is indebted at the time. (Fitzer v. Fitzer, 2 Atk. 511. Taylor v. Jones, 2 Atk. 600.)

A *dictum* of Lord Hardwicke, in Townshend v. Windham (2 Ves. sen. 10), has been much relied on. Supposing Lord Hardwicke's words to be correctly reported, they only amount to this, that he is speaking affirmatively, when a voluntary deed will be good, and so far the proposition is true; but it is not thence to be inferred, that every voluntary conveyance not in favor of a child is bad against subsequent creditors. If, in that passage, the words *"for a child"* had been omitted, still the proposition would have been correct, and I have Lord Hardwicke's authority for saying so, as will appear from some determinations of his, which I shall notice. In Walker v. Burroughs (1 Atk. 93), his Lordship says, "It has been said, all voluntary settlements are void against creditors, equally the same as they are against subsequent purchasers under the statute 27th Eliz. c. 4; but this will not hold; for there is always a distinction upon the two statutes (the 13th Eliz. c. 5, and the 27th Eliz. c. 4.) It is necessary on the 13th Eliz. to prove at the making of the settlement, *the person conveying was indebted at the time, or immediately after the execution of the deed,* or otherwise it would be attended with bad consequences, because the statute extends to goods and chattels, and such construction would defeat every provision for children and families, though the father was not indebted at the time." In another passage in the same case, he says, "Where a man has died indebted, who in his lifetime made a voluntary settlement, upon application to this court to make it subject to his debts as real assets, the court have always denied it, unless you show he was indebted at the time the conveyance was executed." Now here, you observe, the proposition is laid down generally, that a voluntary settlement by one not indebted, is good against subsequent creditors; and it is not said, that to be good such voluntary settlement must be made in favor of a child. In Russell v. Hammond (1 Atk. 15), Lord Hardwicke expresses himself in the same manner. In that case it was also determined, that where a father took back an annuity to the value of the estate comprised in the settlement, it was

tantamount to a continuance in possession, and a circumstance of fraud; and he relieved the creditors against the settlement; but it does not therefore follow that every interest taken back for life is to be considered as fraudulent, but only where it is so reserved for the purpose of defeating future creditors. The meaning, therefore, of what Lord Hardwicke said in Townshend v. Windham, is clearly ascertained by what he said in the other cases to which I have alluded. In Lush v. Wilkinson (5 Ves. 384), a bill by a creditor subsequent to a voluntary settlement made by one not indebted at the time, seeking to impeach the settlement, was dismissed; and in Kidney v. Coussmaker (12 Ves. 155), a voluntary settlement was held to be fraudulent only against such as were creditors at the time. In Sykes v. Hastings, recently determined at the *Rolls* (A. D. 1814), the same rule was acted upon, though the settlement was made under very extraordinary circumstances. It is clear, therefore, from the authorities, that a voluntary settlement of real or personal property, by a person not indebted at the time, nor meaning a fraud, is good against subsequent creditors. * * *

The bill, so far as regards the defendant, F. T., and the other parties interested in the settlement, must be dismissed with costs; and the usual decree taken for an account against the representatives of S. H.[23]

JENKYN v. VAUGHAN

3 Drew. 419

(High Court of Chancery. January 15, 1856)

This was a bill to set aside certain indentures of post-nuptial settlement made by George Concannen, as being fraudulent and void against creditors.

The bill was filed by simple contract creditors of Concannen against the executrix of his will; against the sole acting trustee of one of the deeds; and against the widow; the latter being the real and substantial defendant.

In 1834 Concannen had insured his life for £1,000; in 1833 for £800; and in 1832 for £300.

In 1834 he assigned the £800 policy to Gillson for securing an advance.

23—In re Lane-Fox [1900], 2 Q. B. 508 *acc.*

In 1842 he assigned the three policies to trustees to secure certain benefits to his wife, reserving to himself an absolute power of revocation.

In 1844 he made his will, by which he gave certain property, not including the policies, to his wife; and he gave his residue to Fanny Vaughan, whom he made his executrix.

In 1845 he revoked the deed of 1842, and reassigned the policies to trustees (one of whom disclaimed, leaving W. D. Lewis, a defendant, the sole trustee) on trusts for his wife, again reserving an absolute power of revocation.

He kept the deed in his own hands, and paid the premiums on the policies during his life; and died in 1852, largely indebted.

The debts of the plaintiff arose in 1852.

It was admitted that at the dates of the settlements Concannen was indebted in considerable amounts, besides the mortgage debt secured by the deed of 1834; and there was one in particular to a person named Bouverie, the state of which is noticed in the judgment. But on the evidence it was not clear whether all these previous debts had been liquidated at the dates of the settlements, or whether some of them did not still subsist at the time when the plaintiff's debt accrued.

The principal question was, whether, under these circumstances, the plaintiff could sustain a bill to set aside the voluntary settlements?

THE VICE-CHANCELLOR. The first question, is, whether, in the case of a voluntary settlement, a creditor, whose debt accrued subsequently to the execution of the deed, can file a bill for the purpose of setting it aside. Now it is not in dispute that a subsequent creditor is entitled to participate, if the instrument is set aside by any creditor; and I am not aware that in that case there is any distinction between the two classes of creditors, those who were so before, and those who became so after the deed. I believe they all participate *pro rata*. It is clear therefore that a subsequent creditor has an equity to some extent, viz., a right to participate in the division of the property if the settlement is set aside.

Prima facie then, if a subsequent creditor has an equity, one would suppose there could be no reason to prevent him from filing a bill to enforce it; it is indeed possible that there may be cases where a person who has an equity to participate has not

the right to file a bill; but, *prima facie*, when a party has an equity, he may file a bill to enforce it.

Now the statute of 13 Eliz. c. 5, which is referred to in this case, avoids deeds which are made with intent to defraud or delay creditors. The instrument must be made with the *intent to defraud* creditors. Now, no doubt an instrument may be executed for the purpose of defrauding subsequent creditors; and, with regard to creditors being so at the time, it is established that it is not necessary to show from anything actually said or done by the party, that he had the express design by the deed to defeat creditors; but if he includes in it property to such an amount that, having regard to the state of his property, and to the amount of his liabilities, its effect might probably be to delay or defeat creditors, if the court is satisfied of that, the deed is within the meaning of the statute.

In cases where a subsequent creditor files a bill, it occurs to me that much may depend on this (supposing there is no evidence of anything to show the fraudulent intention but the fact of the settlor being indebted to some extent),—whether, at the time of filing the bill, any of the debts remain due which were due when the deed was executed. In such a case, as any of the prior creditors might file a bill, it appears to me that a subsequent creditor might do so too; but if at the time of filing the bill no debt due at the execution of the deed remains due, the distinction may be that then a subsequent creditor could not file a bill, unless there were some other ground than the settlor being indebted at the date of the deed to infer an intention to defraud creditors. However, I do not find any such rule laid down, and I shall not take upon myself to lay it down positively. But if a subsequent creditor files a bill, and you can show that the person who executed the deed, though indebted at the time he made it, has since paid every debt, it is very difficult to say that he executed the settlement with an intention to defeat or delay creditors, since his subsequent payment shows that he had not such an intention. But it appears to me, in the absence of authority to the contrary, that a subsequent creditor may file a bill, if any debt due at the date of the deed remains due at the time of filing the bill.

When we look at the authorities, we find that in two or three cases, where the question has been raised as to the plaintiff's right to file a bill, being a subsequent creditor, and debts ante-

cedent have been shown still to subsist, the court, having its attention drawn to that, has made a decree in favor of the creditor.

In this case I find sufficient *prima facie* evidence to lead me to the conclusion that something still remains due in respect of the debts which existed at the date of the deed; there is sufficient *prima facie* evidence to justify me in directing an inquiry.

I put aside the mortgage debt secured on the policies of insurance. The policies, so far as the mortgage debt extended, were the property of the mortgagee; and what was retained and settled was only that which remained after satisfaction of the mortgage debt; I put that aside.

But, as to the debt to Bouverie, there is sufficient evidence to induce me to direct an inquiry. The evidence on that debt goes to this,—that to the best of the knowledge and belief of the witness the debt consists of a balance of monies advanced by Bouverie to Concannen, some part of which at least was antecedent to the date of the settlement.

It appears to me that that justifies inquiry; and there are besides various claims, which may turn out to establish debts due at the date of the deed remaining unpaid.

But, in addition to the circumstances arising out of this debt and the claims, it appears that the property which Concannen left is extremely trivial; and at his death it is proved that he was indebted to the extent of many thousands; so that it is not unnatural to suppose that there are still debts unsatisfied which were due at the date of the deed.

As to the intention to delay creditors, it is not immaterial that both deeds are made with general powers of revocation, which enable the settlor to deal with the property, and that he retained possession of the deeds till the time of his death; and it does not appear that any notice was given to any of the insurance offices. All these circumstances are not, it is true, conclusive of fraudulent intention; but they have an important bearing on the question of fraudulent or improper design.

I think, therefore, that I ought to direct inquiries, which will be in the usual form, the form adopted in the cases cited.[24]

24—See Freeman v. Pope, *supra*, p. 165; Ideal Co. v. Holland [1907], 2 Ch. 157. *Cf.* Lane v. Newton, 140 Ga. 415, 78 S. E. 1082.

READE v. LIVINGSTON

3 Johns. Ch. 481

(Court of Chancery, New York. September 28, 1818)

THE CHANCELLOR. This case turns upon the validity of the conveyance by Henry G. Livingston to Gilbert Aspinwall.

The bill charges that Livingston was indebted to John Reade, the plaintiff's intestate, as early as the year 1800, in $6,000, and that, in August term, 1807, Reade obtained a judgment against H. G. L., for upwards of that sum, and that $3,072 of it remains unpaid. That by deed, dated the 7th of December, 1805, H. G. L. conveyed his lands, to the amount in value of $45,000, to Aspinwall, in trust for his wife, and that he had no other property to satisfy the balance of the judgment.

The answer of H. G. L., and of his wife, admitted that in 1800, there were sundry unsettled accounts between the parties, and that they were finally, by rule of court, referred to referees, and that the judgment upon such reference was rendered, as charged in the bill; they admit further, that the lands included in the deed to Aspinwall, composed the greater part of the real estate of H. G. L., though they deny the lands to be of the value charged. H. G. L. states that, prior to his marriage, and with a view to it, he agreed with his wife's father to settle on her, and her children, $30,000, and that the deed was executed in pursuance of that agreement. He admits the sum of $1,392.92 to be still due upon the judgment, and that Reade might have obtained satisfaction out of his personal estate; and he declares, that he was then worth little or no property, though, at the time of his marriage, he was worth $80,000.

It appears, by the proof taken in the cause, that the judgment was founded upon two bonds dated in the year 1794; that the consideration of them was a farm sold by Reade to H. G. L., and that with the proceeds, or by the exchange of that farm, H. G. L. procured the greater part of the lands included in the deed of settlement. That he was married as early as the year 1791, and that at the date of the judgment he owned personal property to $1,000; but it does not appear that he possessed any real property free from incumbrance. Valentine Nutter, the wife's father, says that his wife, Mrs. Nutter, informed him just previous to the marriage that H. G. L. had promised to settle $30,000 on his daughter, and that H. G. L. frequently, after the marriage,

admitted the promise, and at last, at the repeated request of the witness, executed the deed.

The deed to Aspinwall contains no reference to, or recital of, any previous agreement; but it is simply a deed in fee, for the consideration of $5,000, and in trust to convey the lands, and the rents and profits thereof, as the wife of H. G. L., by deed or will, should direct; and, in default of such direction, in trust for her heirs.

I have stated, perhaps, as much of the pleadings and proofs as may be requisite to a full understanding and discussion of the important legal questions involved in the case.

H. G. L. owed the very debt now in question, at the time of the settlement of his real estate upon his wife; and a great part of the lands so settled were purchased with property procured by that same debt. The deed of settlement was not made until 14 years after the marriage, when it is admitted, that, in the meantime, his estate had diminished one-half. It had no reference or allusion to any ante-nuptial contract, nor is there any evidence in writing of such an agreement.

Upon such a state of facts, my earliest impressions were against the soundness of the defense; and I apprehend, there is not a case to be met with that gives any colorable support to such a settlement against such a creditor. But after the elaborate argument which has been made in favor of the deed, I have considered it due to the counsel, as well as to the importance of every question of this nature, to look into the cases, and to give to every topic of argument a careful investigation.

[After concluding that a voluntary settlement as to existing creditors is conclusively presumed to be fraudulent, the chancellor continued]:

With respect to the claims of subsequent creditors, there is more difficulty in arriving at the conclusion; and I am not called upon in this case to give any definitive opinion, for there are no such creditors before the court. But since the subject has been examined, I would suggest what appears to me at present, but with my mind still open for further discussion and consideration, to be the better opinion from the cases; it is, that the presumption of fraud as to these creditors, arising from the circumstance, that the party was indebted at the time, is repelled by the fact of these debts being secured by mortgage, or by a provision in the settlement; that if no such circumstance exists, they are entitled to impeach the settlement by a bill properly

adapted to their purpose, and charging and proving indebtedness at the time, so that their rights will not depend on the mere pleasure of the prior creditors, whether they will, or will not impeach the settlement, that the question then arises, To what extent must the subsequent creditors show a prior indebtedness? Must they follow the dictum of Lord Alvanley, and show insolvency, or will it be sufficient to show any prior debt, however small, as is contended for by Mr. Atherley, with his usual ability, in his Treatise on Marriage Settlements? (Ath. Mar. Set. pp. 212 to 219.) I should apprehend, that the subsequent creditors would be required to go so far, and only so far, in showing debts, as would be sufficient to raise reasonable evidence of a fraudulent intent. To show any existing debt, however trifling and inevitable (to which every person is, more or less, subject), would not surely support a presumption of fraud in fact; no voluntary settlement in any possible case could stand upon that construction. I should rather conclude, that the fraud in the voluntary settlement was an inference of law, and ought to be so, as far as it concerned existing debts; but that, as to subsequent debts, there is no such necessary legal presumption, and there must be proof of fraud in fact; and the indebtedness at the time, though not amounting to insolvency, must be such as to warrant that conclusion. It appears, in all the cases (and particularly in the decision of Sir Thomas Plumer since the publication of Mr. Atherley's treatise), that a marked distinction does exist, under the statute of 13 Eliz., between prior and subsequent creditors, in respect to these voluntary settlements; and it is now settled that the settlement is not void, as of course, against the latter, when there were no prior debts at the time.

The law in Massachusetts seems to be laid down according to this view of the subject.

In Bennett v. Bedford Bank (11 Tyng, 421), there was a voluntary conveyance to a son by a father, indebted at the time, but not in embarrassed circumstances, or equal in debt to the value of his property. The debt to the plaintiff did not accrue until several years afterwards. It was held by the court, that as there was no fraud in fact, the deed in this case was good against the subsequent creditor, "and against all persons but such as were creditors at the time."

But there is a case, recently decided by the Supreme Court of Errors of Connecticut (Salmon v. Bennett, 1 Day's Conn. Rep.

N. S. p. 525), which lays down a rule somewhat different from that which I have deduced from the English cases.

The question arose in an action of ejectment. The plaintiff had purchased Virginia lands of Sherwood, in 1794, and paid him the purchase money. In 1809, by a decree in chancery, the sale was annulled, on the ground of fraud, and the purchase money decreed to be refunded, on condition that the plaintiff executed a release. This was done, and he afterwards, in 1814, levied an execution founded on that decree, on lands which Sherwood owned in 1794, but which he had conveyed to his son in 1798, in consideration of natural affection only, and which lands the son had, in 1802, conveyed to the defendant, with knowledge of the deed to the son. It was proved, that when Sherwood executed the deed of gift, he was not indebted to any person, except to the plaintiff, in the manner stated, and that the lands conveyed did not contain more than one-eighth part of his real estate. But it was admitted that long before the levy of the execution, he had conveyed all his real estate, and was at that time, destitute of property.

One question was whether the deed to the son, being voluntary, was not fraudulent as against the plaintiff; and as the opinion of the court was on this point, I need not notice any other. It was also made a question, at the bar, whether the plaintiff was to be deemed an existing creditor at the time of the deed to the son; but as the court assumed the fact of an existing indebtedness at the time of the conveyance, I need not notice that point.

The judgment of the court was in favor of the defendant, and the opinion of eight of the judges, as delivered by the chief justice was, that a distinction existed in the case of a voluntary conveyance, between the children of the grantor and strangers, and that mere indebtedness at the time will not, in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child; that an actual or express intent to defraud need not be proved, for this would be impracticable in many instances where the conveyance ought not to be established, and it may be collected from the circumstances of the case; that if there be no fraudulent intent, and the grantor be in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift a reasonable provision for the child, leaving ample funds unencumbered, for the payment of the grantor's debts, the voluntary conveyance to the child will be valid against existing creditors. But if the grantor be con-

siderably indebted and embarrassed, and on the eve of bankruptcy, or if the gift be unreasonable, disproportioned to his property, and leaving a scanty provision for his debts, the conveyance will be void, though there be no fraudulent intent. And it was concluded, that, under the circumstances of that case the indebtedness of the grantor, at the time, to the plaintiff, was not sufficient to affect the conveyance to his son.

The court do not refer to authorities in support of their opinion, and, perhaps, they may have intended not to follow, strictly, the decisions at Westminster Hall, under the statute of 13 Eliz. I can only say that, according to my imperfect view of those decisions (and by which I consider myself governed), this case was not decided in conformity to them; but I make this observation with great deference to that court. There may be loose sayings, and mere notes of cases, from which nothing very certain or intelligible can be deduced; but I have not been able to find the case in which a mere voluntary conveyance to a wife or child has been plainly and directly held good against a creditor existing at the time. The cases appear to me to be upon that point uniformly in favor of the creditor. The vice-chancellor, in Holloway v. Millard, says, in so many words, that "a voluntary disposition, even in favor of a child, is not good, if the party is indebted at the time." The cases of St. Amand v. Barbara, Fitzer v. Fitzer, Taylor v. Jones, and, indeed, the general language throughout the cases, seem to me to establish this point. So Lord Hardwicke observed, in Lord Townshend v. Windham, that, "He knew of no case on the 13 Eliz. where a man, indebted at the time, makes a mere voluntary conveyance to a child, without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." In a preceding part of the same page, he said expressly, there was "no such case," unless the conveyance was "in consideration of marriage, or other valuable consideration;" and he draws the distinction between prior and subsequent creditors, in saying that if the voluntary conveyance of real estate, or a chattel interest, was by one not indebted at the time, and was for a child, and no particular evidence or badge of fraud as against subsequent creditors, it would be good. The decision in that case was, that a general power of appointment given over an estate, in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was to be deemed assets in favor of creditors,

If the question rests not upon an actual fraudulent intent (as is admitted in all the cases), it must be a case of fraud in law, arising from the fact of a voluntary disposition of property, while indebted; and the inference founded on that fact cannot depend on the particular circumstances, or greater or less degree of pecuniary embarrassment of the party. These are matters for consideration, when we are seeking, as in the case of subsequent creditors, for actual fraud. I apprehend it is, upon the whole, better and safer not to allow a party to yield to temptation or natural impulse, by giving him the power of placing property in his family beyond the reach of existing creditors. He must be taught by the doctrines of the court, that the claims of justice are prior to those of affection. The inclination of my mind is strongly in favor of the policy and wisdom of the rule, which absolutely *disables* a man from preferring, by any arrangement whatever, and with whatever intention, by *gifts* of his property, his children to his creditors. Though hard cases may arise in which we should wish the rule to be otherwise, yet, as a permanent regulation, more good will ensue to families, and to the public at large, by a strict adherence to the rule, than by rendering it subservient to circumstances, or by making it to depend upon a fraudulent intent, which is so difficult to ascertain, and frequently so painful to infer.

The effect of these donations, by a debtor, *inter vivos*, is much discussed by Voet in his commentaries, on the Digest, lib. 39, tit. 5, De Donationibus, s. 20; and he concludes that the property in the hands of the donee is chargeable with the *existing* debts of the donor. *Ex eo autem, quod donator competentiae gaudens beneficio deducit primo aes alienum, facilis est decisio quaestionis, utrum donatis omnibus bonis, aut majore eorum parte, donatarius ad aes alienum donantis solvendum obligatus sit?—Aequum haud foret, ex liberalitate, defuncti creditores ejus, donatione antiquiores (nam qui postea demum crediderunt, ex donatione praecedente jam perfecta videri nequeunt fraudati esse) credito suo defraudari, satiusque visum, donata revocori per actionem Paulianam, etiam a donatorio in bona fide posito ac fraudis haud participe. Dum melior esse debuit conditio creditorum de damno evitando agentium, quam donatarii agentis de lucro captando. Secundum hodierni juris simplicitatem donatarium a creditoribus donatoris recta via absque circuitu ad solvendum aes alienum donantis compelli posse, post multos alios citatos tradit. Graenewegen, ad. l., 28 ff. h. t.*

This learned civilian makes the same distinction that our law does, between debts existing at the time, and debts created subsequent to the gift.

The same doctrine, on this subject, in all essential respects, is adopted in France. The gift of specific articles does not charge the donee with the debts of the donor, unless the latter knew, or ought to have known, that he was not solvent at the time; in which case the gift is held to be fraudulent. But in other more general dispositions of the whole, or part, of his estate, the property in the hands of the donee is subject to the existing, though not to the future, debts, to the value of the gift. *(Traité des Donat. entre vifs. § 3, art. 1, ¶ 2. Oeuvres posth. de Pothier, tom. 6.)*

The question does not arise, in this case, as to what extent these voluntary dispositions of property can be reached. Here the land itself exists in the hands of the trustee for the wife, and we have no concern, at present, with the question, how far gifts of chattels, of money, of choses in action, of corporate, of public stock, or of property alienated to a *bona fide* purchaser, can be affected. The debt in the present case was large, and the disposition extravagant, being of the greater part of the real estate; and we have no evidence of sufficient property left unencumbered. Even if we were to enter into the particular circumstances of the case, I should have no doubt of the justice of the creditor's claim.

I shall, accordingly, decree, that a reference be had to ascertain the balance of principal and interest due to the plaintiff, and that so much of the lands, included in the conveyance to Gilbert Aspinwall, as the master shall judge sufficient to satisfy that amount, with costs, be sold; and that the said G. A. be directed to join in the conveyance.

Decree accordingly.

HARLAN v. MAGLAUGHLIN

90 Pa. St. 293

(Supreme Court of Pennsylvania. October 6, 1879)

Ejectment by Maud Maglaughlin and Wilmer K. Maglaughlin, by their guardian, William A. Coffey, against Anne Harlan and David Sipe for two lots in Carlisle, Pennsylvania.

On March 31, 1859, John Mell conveyed by a deed a lot of ground to Isabella Noble, wife of John B. Noble, for $50. This

deed was duly recorded August 27, 1859. To the same grantee William Blair conveyed, by deed, a lot of ground on March 20, 1865, for $200, which deed was recorded March 28, 1868. On March 5, 1869, John B. Noble made a note payable to Christ. Kindler, upon which suit was brought, and judgment recovered for $129.47, with interest from 22d September, 1869. A *fi. fa.* and *vend. ex.* issued upon this judgment and the above-mentioned lots were sold, as the property of John B. Noble, in 1870, to Charles E. Maglaughlin, whose heirs bring this ejectment. Isabella Noble, dying about 28th June, 1875, letters of administration on her estate were issued to J. J. Good, who, under an order of the Orphans' Court of Cumberland County, sold the above lots, October 31, 1877, to David Sipe, one of the defendants.

At the trial, before Herman, P. J., the plaintiff gave evidence tending to show that John B. Noble paid for these lots and directed the name of his wife to be used as that of the grantee therein. There was also evidence that, when the first deed was made, Noble was indebted to different parties, in the sums of $3.37, and $60, payment of which was not shown; that, in the year 1859, after the Mell deed was made, debts were contracted to the following amounts: May 10th, $18; May 20th, $45; November 29th, $39 (reduced October 14, 1861, to $35.49); in the year 1860, as follows: January 13th, $60, which was *paid;* February 22d, $21.92, likewise *paid;* judgment April 14, 1860, for $5 penalty, for use of scales at suit of Borough of Carlisle; and in 1862, May 14th, $4.02, which was *paid;* another, originally $65, but, 26th November, 1862, reduced to $6.50.

As evidence of fraudulent intent on the part of Noble in having these conveyances made to his wife, one Foote testified that Noble "told me before the war, in 1859, that he was in a good bit of trouble, and that he was going to put what he had, his property, over into Belle's hands. He called his wife Belle."

* * *

The verdict was for the plaintiffs. Defendants took this writ, and, *inter alia,* assigned for error the answers to the above points.

MR. JUSTICE GORDON delivered the opinion of the court.

The court below fell into an error which pervades every part of this case. A single point and answer will serve to develop this error, and determine the material questions involved in this controversy. The counsel for the defendants below, plaintiffs

in error, asked the court to say to the jury that "to render a voluntary conveyance void, as to subsequent creditors, it must appear that it was made in contemplation of future indebtedness, and, until this was shown, the plaintiffs could not call upon the defendants to prove the consideration for the conveyance to Isabella Noble through whom they claim title." The court answered: "This would be so, if, at the time of the voluntary conveyance, no debts of the grantor existed, the recovery of which would be thereby delayed, hindered or defeated. Where there are existing debts at the time, and the conveyance has delayed, hindered or defeated their recovery, this circumstance raises a suspicion of fraud from which an intent to defraud subsequent as well as existing creditors may be inferred."

This language is borrowed from the case of Thompson v. Dougherty, 12 S. & R. 448, where it is applied, as in the case in hand, to debts contracted after the execution of the voluntary grant. It is, however, mere *obiter dicta*, not called for by the facts in the case, and not true in law. Notwithstanding the many loose declarations in the books to the contrary, the statute 13 Elizabeth does not make voluntary conveyances void as to future creditors, unless there is some evidence to indicate that the grantor intended to withdraw his property from the reach of such creditors: Snyder v. Christ, 3 Wright 499. And it is properly said in Williams v. Davis, 19 P. F. Smith 21, that even an expectation of future indebtedness will not render a voluntary conveyance void where there is no fraud intended by such conveyance. And so, also, in Thompson v. Dougherty, Mr. Justice Duncan, citing Saxton v. Wheaton, 8 Wheat. 229, says, "Chief Justice Marshall decided that a post-nuptial settlement on a wife and children by a man who is not indebted at the time, was valid against subsequent creditors, and that the statute does not apply to such creditors if the conveyance be not made with a fraudulent intent." A similar ruling will be found in Townsend v. Maynard, 9 Wright 198, and in Greenfield's Estate, 2 Harris 489. In the latter case, which involved a deed of trust of all the grantor's property, it was alleged by Mr. Justice Bell, to be a sound rule of law that subsequent indebtedness cannot be invoked to invalidate a voluntary settlement made by one not indebted at the time, or who reserves sufficient to pay all existing debts, unless there be something to show that the settlement was made in anticipation of future indebtedness. It is further said that though some doubt was thrown on this principle by Thomp-

son v. Dougherty, it was afterwards dissipated by Mateer v. Hissim, 3 P. & W. 161. Furthermore, the case of Snyder v. Christ, above mentioned, which is very like the case in hand, settled any doubts that may previously have existed as to the effect of subsequent indebtedness. For though it seems to have been generally admitted that the statute is not operative as to such indebtedness, yet the admission has been so beclouded by apparently inconsistent *dicta* and qualifications, as to render its meaning obscure and unintelligible. The settlement is good against after contracted debts *if* the settlor is unindebted at the time, or *if* he has made provision for existing debts, and so on. But how, if there be existing debts not provided for, and how if the settlement is fraudulent as to such debts? Will the settlement, in such case, be void as to all future indebtedness? Is there no place for repentance and atonement by the after payment of existing debts, or may after creditors, notwithstanding such payment, avoid the deed? Justice Duncan answers these questions by saying: "If the jury find a prior indebtedness and any of that class of creditors is defeated by the settlement, then, my opinion is, that the property conveyed is to be considered as part of the estate of the debtor for the benefit of all his creditors. I know no midway. When a statute declares a matter void it thrusts all to destruction like a tyrant, while the common law, like a nursing father, makes that void where the fault is and preserves the rest." In this, singularly enough, the fact is overlooked that the statute makes the gift or deed void, *only*, as to those who may be hindered, delayed or defrauded thereby, and that in this it follows the common law. This oversight, however, would seem to be accounted for by the fact that the opinion of Chief Justice Spencer in Anderson v. Roberts, 18 Johns. 526, is adopted, wherein it is said, that the Statute of 13 Elizabeth protects creditors whose debts accrue subsequently to the fraudulent conveyance equally as those whose debts were due when it was made.

It would seem to be on this that Justice Duncan founds the assertion, already referred to, that the existence of prior debts creates a suspicion of fraud, which can only be repelled by showing that the subsequent creditors were provided for in the settlement. This, as it stands, is unintelligible; for one cannot provide for what he does not anticipate; if he has no future debts in contemplation, how is it possible to make provision for them? It, in fact, simply amounts to saying that the statute is operative

upon subsequent, as well as present, indebtedness. In like manner, it has been said, the settlor must not only retain property enough to satisfy present debts, but also to answer the reasonable probabilities of the future. But this rule is unreasonable in this, that it prevents men of limited means from making any settlement whatever upon their wives and children, a result certainly not contemplated by the statute. Besides this, the attempt to keep men and women in judicial leading strings all their lives, to direct what they shall or shall not do with their own property, is a matter which commends itself neither to sound legal reason nor to common sense. If a man is in debt, he may not give away his property until he has paid or provided for such debt; the reason for this is found in the principles of common honesty. If he contemplates future indebtedness, he must, for a like reason, provide for it, but he must not provide for what he does not anticipate, and for what may never occur. And if, without concealment, a man chooses to give away all his estate, or settle it upon his wife and children, what right has a subsequent creditor to complain? It did him no harm; he gave the grantor no credit because of such property; he is, therefore, neither cheated nor impoverished by such gift. Furthermore, if A, by a voluntary conveyance, defrauds B this year, how is C, whose debt has no existence until ten years after, defrauded by that same conveyance? It certainly will not do to say that because B was cheated therefore C is cheated, for between B and C there is no possible connection or privity. But if C has not been defrauded by the grant, then, if the statute means what it most expressly says, he cannot impeach it.

We turn, therefore, with satisfaction to the case of Snyder v. Christ, where we have the plain and unambiguous declaration, that the subsequent creditor can avail himself only of that fraud which is practiced against himself. The doctrine thus announced is made the more positive in that it is said, if the creditor knew of the voluntary conveyance when he gave the credit, he could not be defrauded thereby, and, hence, could not impeach it.

This case, not only from the direct manner in which the principal subject of discussion is treated, but also by reason of the facts upon which it depends, must be regarded as a final determination of the question in hand.

These facts are briefly as follows: John Snyder, being the owner of a tract of one hundred acres of land, conveyed it to one John Reger, in trust for the use of himself and wife for

their joint lives and the life of the survivor of them, with remainder to two children of the wife, and to such children as the grantors might have. This was all the real estate Snyder owned, and it was in proof, that at the date of the deed, his debts amounted to some $200, and that his personal property did not exceed in value $150. Furthermore, he had expressed apprehensions of a claim for damages for a breach of promise suit of marriage, and, within a few days after the making of the deed, he had borrowed $200, and had also contracted the debt, on a judgment for which the property in suit was sold.

Here, then, we have every element necessary for a test case. A voluntary deed in trust of all the grantor's real estate, providing, *inter alia,* for himself for life; existing debts unprovided for, and as to which this deed was undoubtedly fraudulent; no property reserved for the reasonable probabilities of the future, an immediate contraction of subsequent debts, and an expressed apprehension of a pending claim for damages. It was, nevertheless, held, that of these facts the subsequent creditor could not avail himself, unless he could further show that a fraud was intended against himself. In other words, these facts standing alone, did not make for him even a *prima facie* case.

Snyder v. Christ was followed in Monroe v. Smith, 29 P. F. Smith 459, in which it was said that a deed, void as to existing creditors, by reason of the grantor's fraud, is not necessarily void as to subsequent creditors; that it is bad only as to those it is intended to defraud.

It is scarcely necessary to say that these cases rule the one now under consideration. The deed of John Mell to Isabella Noble was executed on the 31st of March, 1859, and was recorded in August of the same year. The deed of William Blair to Mrs. Noble was made March 20, 1865, and was recorded 28th of March, 1868. The judgment of Kindler v. John B. Noble, upon which the property in dispute was sold, was founded on a note dated March 5, 1869, ten years after the date of the first deed, and nearly three years after the date of the second. When, in addition to this, we reflect that Noble's debts at no time were large; that the testimony of Foote relates to declarations made by Noble ten years before Kindler's debt had an existence; that there is not one particle of evidence, direct or indirect, that a fraud was intended on future creditors, we must certainly con-

clude that the plaintiffs had no case, and that the court should so have instructed the jury.

The judgment is reversed, and *venire facias de novo* awarded.[25]

WASHINGTON NAT. BANK v. BEATTY

77 N. J. Eq. 252, 76 Atl. 442

(Court of Errors and Appeals of New Jersey. June 21, 1910)

DILL, J. This appeal from the Court of Chancery brings up for review a judgment dismissing the bill in a creditor's action to set aside a voluntary conveyance of real estate. The bill charges the transaction as being "in violation of the statute entitled 'An act for the prevention of frauds and perjuries,' approved March 27, 1874." Rev. St. 1874, p. 299. There is no element in the case, either by way of pleading or proof, that the complainant bank gave any credit to the defendant relying upon his ownership of the property in question. The answer, denying the material allegations of the bill, specifically raises the

25—Schell v. Gamble, 153 Cal. 448; Cartersville First Nat. Bank v. Bayless, 96 Ga. 684; Springer v. Bigford, 160 Ill. 495; Stumph v. Bruner, 89 Ind. 556; Brundage v. Chenoworth, 101 Iowa, 256; Sheppard v. Thomas, 24 Kan. 780; Williams v. Kemper, 99 Minn. 301; Simmons v. Ingram, 60 Miss. 886; Cole v. Cole, 231 Mo. 236; Ayers v. Wolcott, 66 Neb. 712; Crawford v. Beard, 12 Ore. 447; Aldons v. Olverson, 17 S. D. 190; Schreyer v. Scott, 134 U. S. 405, *acc.*

"It is true, that it has been held in some cases, that where a conveyance by a debtor was fraudulent in its inception as to his creditors at the time, it will be so treated as to subsequent creditors. But these cases must rest upon one of two principles, the property was either so situated that it enabled the debtor to obtain credit upon the faith of it, or the fraudulent vendee was regarded as a trustee under the secret arrangement between the parties, and in virtue of such secret understanding, bound at least so far as his word or such contract could bind him, to account to the fraudulent vendor. * * * In the present case, however, it is neither shown that the debts were contracted upon the faith of the property, nor that the defendant was in any manner a trustee for, or accountable to, her husband." Winn v. Barnett, 31 Miss. 653.

"It seems that the fraudulent intent should relate to or affect subsequent creditors, and the burden of proving the necessary ingredients of the fraud is placed upon the subsequent creditors. Where it is not simply a case of subsequent creditors seeking to share with prior creditors in the proceeds, but the case is, as here, that of a subsequent creditor alone seeking to invalidate the conveyance, and subject the land to sale for his benefit, the prior creditor, to defraud whom alone the conveyance was made, hav-

issue that the firm of commission merchants, hereinafter referred to, were not at the time of the conveyance or subsequently, creditors of the defendant, within the purview of the statute.

The essential facts of the case are within a narrow scope. In 1894, David C. Beatty, a farmer, consigned certain farm produce to a firm of commission merchants in New York. They failed to remit the proceeds. Beatty, in his wrath, exposed to public view a card on which he had written "All fruit shippers beware of" [naming the commission merchants]. "They are damned frauds." Two days later, the commission merchants wrote, threatening to sue him for $100,000 damages. This so alarmed the farmer that he put his property out of his hands, transferring the farm which he owned and the mortgages he held on another farm to his son without consideration, and at once duly recorded the conveyances. The complainant offered no evidence to controvert Beatty's statement that the commission merchants were frauds in that they converted to their own use proceeds due him. The case shows affirmatively that the commission merchants never did more than to threaten Beatty and never proceeded, in

ing been paid by the grantee, the plaintiff should show that the conveyance was a continuing fraud, and not rely solely on the fact that it was made to defraud the prior creditor." Stumph v. Bruner, 89 Ind. 556, 561.

"Now it is true that the fact that a person has entered into a hazardous business, or engaged in a speculative enterprise, at or soon after the execution of a voluntary conveyance, is strong evidence of a fraudulent intent. It evinces a desire to reap the benefit for himself if successful, and escape responsibility if unlucky. Nevertheless, each case must stand upon its own footing, and no legal rule can be adopted as to the quantity of proof or the particular complexity of facts which will annul a conveyance upon this ground. The character of the business, the degree of pecuniary hazard incurred, the amount of property remaining in the grantor, the value of the property conveyed, the acts and words occurring coincidently with the transaction, are to be viewed together in solving the question of fraudulent intent." Hagerman v. Buchanan, 45 N. J. Eq. 292, 302.

"It is doubtless true, as contended by the defendant, that a finding of fraud as to subsequent creditors would not be warranted by the simple proof that the transfer was made with a design to settle the property upon the defendant so that it should not be exposed to the hazards of his future business or liable for any future debts which he might contract. Winchester v. Charter, 12 Allen. 606, 611; Mowry v. Reed, 187 Mass. 174, 177, and cases cited. It must further appear that at the time of the conveyance he had an actual intent to contract debts and a purpose to avoid by the conveyance the payment of them. Stratton v. Edwards, 174 Mass. 374, 378, and cases cited." Gateley v. Kappler, 208 Mass. 426, 428.

any way, to establish the verity of their claim for damages, never sued him, and never obtained any judgment against him, but were content to let the matter stand in *statu quo* until the statute of limitations had intervened. Admittedly, Beatty made the transfer for the purpose of making himself judgment proof against these commission merchants, if they should sue him and if the judgment should go against him. There is no evidence of any other claims or debts against Beatty. The bank, which was not organized until five years after the conveyance by Beatty, obtained a judgment against him on an accommodation note 12 years after the transfer, and to collect this judgment it now seeks to set aside the deed. The vice chancellor below dismissed the bill, holding: First. That under the evidence the commission merchants whose threat to bring suit induced the transfers were, within the meaning of the statute of frauds, creditors at the time the transfers were made, and that the deeds were fraudulent as to them. Second. That a conveyance made for the purpose of defrauding a single existing creditor is not void as against subsequent creditors, the incurring of the debts to whom was not within the contemplation of the debtor at the time when the conveyance was made.

We concur in the action of the vice chancellor in dismissing the bill, but not with his conclusions of law. Taking them in their inverse order, the first legal question is whether a creditor whose debt is contracted subsequent to the execution of a deed, which is fraudulent as against a single existing creditor, in order to have such deed set aside, must show not only that the deed was fraudulent as to such existing creditor, but also that it was made with intent to defraud such persons as should, subsequent to its date, become creditors of the grantor. The vice chancellor held to the affirmative of this proposition, relying to some extent upon the statement of Vice Chancellor Pitney in Gray v. Folwell, 57 N. J. Eq. 446, at p. 456, 41 Atl. 869, and following the rule laid down by Vice Chancellor Van Fleet in Gardner v. Kleinke, 46 N. J. Eq. 90, 18 Atl. 457. In our judgment the rule laid down by Vice Chancellor Van Fleet in Gardner v. Kleinke, *supra*, and the holding of the vice chancellor in this case below, in accordance therewith, were erroneous.

The effect of the statute is to make a voluntary deed fraudulent as against existing creditors, without regard to the intention with which it was executed. It is fraudulent in law. This was settled in 1879 by this court in Haston v. Castner, 31 N. J.

Eq. 697. The effect of a voluntary conveyance upon the rights of subsequent creditors was decided by us in 1889. Hagerman v. Buchanan, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732. It is true that it was considered by the Court of Chancery in Gardner v. Kleinke, *supra*, that Hagerman v. Buchanan established the principle that a subsequent creditor was not entitled to have a voluntary conveyance set aside unless he could show that it was made with intent to defraud such persons as should, subsequent to its date, become creditors of the grantor. The following language of Mr. Justice Reed in the opinion was cited by Vice Chancellor Van Fleet as requiring that conclusion: "A voluntary settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the mind of the parties, at the time of the execution of the conveyance, to hinder, delay, or defraud creditors by means of the deed." But the citation does not justify the conclusion. In fact, it declares that the test is an actual intent in the mind of the grantor to defraud creditors—not subsequent creditors alone, but any creditors—and that this is the principle intended to be established by that decision is made plain by the subsequent language of the opinion, where Mr. Justice Reed, speaking of subsequent creditors, says: "An actual fraudulent intent to defraud some creditors must be proved."

The true rule is that, when a conveyance is attacked by a subsequent creditor, the question to be determined is whether the conveyance was fraudulent. The question is the same when attacked by an existing creditor; the only difference is the method of proof. When an existing creditor attacks the conveyance, and shows that his debt was incurred before, and was existing at the time when, the conveyance was made, the law, without further proof, raises a conclusive presumption of fraud so far as that creditor is concerned. When, however, the conveyance is attacked by a subsequent creditor, he must prove fraud as a fact,[26] that is, "an actual fraudulent intent to defraud some creditor." By some creditor is meant any creditor, either existing at the time when the conveyance is made or subsequently. If this be shown, the conveyance is proven to be fraudulent, and it may be set aside at the instance of any class of creditors, without regard to the time when the debt came into existence.[27]

26—See 20 Cyc. 424, note 12, for many cases in accord.

27—Prestwood v. Troy Fertilizer Co., 115 Ala. 668; Buchanan v. Williams (Ark.), 160 S. W. 190; Mulock v. Wilson, 19 Colo. 296; Wood-

The next question is whether, under the evidence, the commission merchants, who asserted the claim for damages upon an alleged liability, were proven to be existing lawful creditors or other persons named in the statute entitled to set aside the conveyance as fraudulent against them.

It was necessary for the bank, as a subsequent creditor, to prove: (1) A voluntary conveyance; (2) an existing creditor or other person having a lawful claim or debt within the meaning of the statute; (3) an actual intent on the part of the defendant by means of the deed to delay or hinder some creditor, existing or subsequent.

Conceding that an actual intent on the part of the defendant to defeat any judgment which the commission merchants might have obtained is proven, the question still remains whether they come within the purview of the statute. The rule, both in England (Twyne's Case, 3 Coke, 82), and in this state, is that the statute extends its protection to all persons having a valid cause of action arising from torts as well as from contracts. Boid v. Dean, 48 N. J. Eq. 193, 21 Atl. 618; Post v. Stiger, 29 N. J. Eq. 554; Scott v. Hartman, 26 N. J. Eq. 89; Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361.[28] Nevertheless, a tort claimant, to place himself in the position of a lawful creditor or person competent under the statute to set aside a voluntary conveyance, must reduce his claim to judgment, and thus establish a legal debt against the fraudulent grantor. When his claim has thus been liquidated and established as a lawful debt, he may attack a voluntary conveyance made after the liability arose and before suit was brought, to defeat his debt, on the theory that such judgment when once obtained relates back and establishes a debt as of the time when the original cause of action accrued.[29]

bury v. Sparrel Print., 187 Mass. 426; Jones v. Light, 86 Me. 437; Cook v. Lee, 72 N. H. 569; Trezevant v. Terrell, 96 Tenn. 528; McLane v. Johnson, 43 Vt. 48; Johnson v. Wagner, 76 Va. 587; Silvernail v. Greaser, 27 W. Va. 550, *acc.* In Cole v. Brown, 114 Mich. 369, 400, the Court said: "We are not called upon to determine whether a subsequent creditor can successfully attack a conveyance by the sole proof of an actual intent to defraud existing creditors. Upon this question the authorities do not seem to be in harmony. See Bump, Fraud. Conv. c. 13." But see Herschfeldt v. George, 6 Mich. 456; Hopson v. Paine, 7 Mich. 334.

28—See Rosen v. Levy, 120 Tenn. 642, 113 S. W. 1042.

29—See 20 Cyc. 430, for citation of many cases in accord.

"At the time of the execution of

The complainant failed to bring this case within the rule that if after a person has incurred a liability for a tort, and before suit brought upon it, he makes a voluntary conveyance or settlement of his property, and judgment afterwards goes against him for the tort, the conveyance is void as against that judgment. See Boid v. Dean, 48 N. J. Eq. 193, 203, 21 Atl. 618. A subsequent creditor who attacks a voluntary conveyance as in fraud of a person at the time of the conveyance, claiming damages based on the tort of the grantor, must make legal proof of the verity and legality of the claim. See Baker v. Gilman, 52 Barb. (N. Y.) 26. A judgment in favor of the claimant and against the tort-feasor would be conclusive evidence. What further or other proof would be equivalent thereto we are not called upon in this case to decide, for the complainant, upon this point, offered no evidence. The verity of the claim of the commission merchants has not been established by any judgment or competent proof, and the complainant bank, therefore, failed to prove that the commission merchants were lawful creditors or other persons within the meaning of the statute, the intent to defraud whom would vitiate the conveyance. As against claims and demands, the verity of which is never established by any judgment or competent proof, the statute does not forbid conveyances or assignments or declare them to be void.

Therefore, upon the ground stated in this opinion, the judgment of the court below dismissing the bill of complaint is affirmed.

WADSWORTH v. SCHISSELBAUER

32 Minn. 84

(Supreme Court of Minnesota. May 15, 1884)

Plaintiff brought this action in the District Court for McLeod County, alleging in his complaint the recovery, on April 25, 1882,

the conveyances, which Mrs. Lewis, the plaintiff below, sought to have set aside as fraudulent and void as to creditors, she was not a creditor of the grantor, Thomas Evans. True, she had a valid cause of action against him, at that time, but one sounding in tort, and which was not asserted even by bringing suit thereon, till a month or more thereafter. The existence of such a cause of action clearly does not establish the legal relation of debtor and creditor between the wrongdoer and the party injured. Evans v. Lewis, 30 Oh. St. 11, 14. See Bigelow Fr. Conv. (Knowlton's ed.), p. 194 n.

of a judgment in Justice Court in the same county, in favor of one Albrecht and against defendant, A. Schisselbauer, for $66.55, the cause of action being a promissory note made by him; the issuing and return unsatisfied of an execution from the Justice Court; the subsequent docketing of the judgment in the District Court for the same county on January 24, 1883, and an assignment to the plaintiff filed in the same court on January 25, 1883. He also alleges the recovery and docketing of a judgment in his own favor against the same defendant, on January 13, 1883, in Justice Court in the same county for $92.40, in an action founded on express contract; the issuing and return unsatisfied of an execution from the Justice Court; the docketing of the judgment in the District Court for the same county on January 24, 1883. The complaint also states that on January 25, 1883, and after the assignment to plaintiff, executions on the two judgments issued from the District Court, and were delivered to the proper officer for service, who returned them wholly unsatisfied. That on March 24, 1882, and after he had become indebted upon the causes of action on which the judgments were rendered, the defendant, A. Schisselbauer, and the defendant, Barbara, his wife, conveyed to defendant, Dorman, lots 1, 2, 3, 6 and 7 in block 7 in the platted portion of Glencoe in McLeod County, and containing more than one acre, with intent to defraud the creditors of the former, and especially the plaintiff; that Dorman took the deed with knowledge of the fraud, and on April 15, 1882, conveyed the same property to defendant, Barbara, without any consideration; that both deeds were recorded.

Judgment is demanded that each of the deeds be declared fraudulent and void, and be cancelled of record; that each of the judgments be adjudged to be a lien on the real estate, and that it be adjudged to be subject to levy and sale on execution for the satisfaction of the judgments, with the general prayer for relief.

A demurrer to the complaint as not stating a cause of action was sustained by Macdonald, J., and the plaintiff appealed.

MITCHELL, J. There are two classes of cases, both commonly called creditors' suits, which, although closely allied, are clearly distinguishable. The first, a creditor's suit strictly so-called, is where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor, which could not be reached

on execution. The general rule is that such an action cannot be brought until the creditor has exhausted his remedy at law by the issue of an execution and its return unsatisfied. This was required because equity would not aid the creditor to collect his debt until the legal assets were exhausted, for, until this was done, he might have an adequate remedy at law. The execution had to be issued to the county where *the debtor resided,* if a resident of the state. Its issue to another county would not suffice. Reed v. Wheaton, 7 Paige, 663. The second class of cases is where property legally liable to execution has been fraudulently conveyed or incumbered by the debtor, and the creditor brings the action to set aside the conveyance or incumbrance as an obstruction to the enforcement of his lien; for, though the property might be sold on execution notwithstanding the fraudulent conveyance, the creditor will not be required to sell a doubtful or obstructed title. In the latter class of cases, the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant relief in such cases, but upon the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property. As to him the conveyance is void, and he has a right to have himself placed in the same position as if it had never been made. The fact that other property has been retained by the debtor may be evidence that the conveyance is not fraudulent; but if the grantee's title be tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed. Botsford v. Beers, 11 Conn. 369; Weightman v. Hatch, 17 Ill. 281; Vasser v. Henderson, 40 Miss. 519.

There is much conflict of authority as to how far the creditor must first proceed at law. It has been held in some cases that if an execution has not been returned unsatisfied, an execution must be issued and the action brought in aid of an execution then outstanding. Such seems to be the latest view of the courts of New York, after much vacillation and conflict of decision. Adsit v. Butler, 87 N. Y. 585. But the prevailing and, as we think, on principle, the better rule is that the creditor need only proceed at law far enough to acquire a *lien* upon the property sought to be reached before filing his bill to set aside a

fraudulent conveyance. The extent to which he must proceed to do this will depend on the nature of the property. If it be personal, there must be a levy, for until this is made he has no lien. If it be real estate, it is enough to obtain judgment, and docket it in the county where the lands are situated. 1 Am. Lead. Cas. 54, 55; 2 Barb. Ch. Pr. 160; Bump on Fraudulent Conveyances, 523; Weightman v. Hatch, *supra;* Newman v. Willetts, 52 Ill. 98; Vasser v. Henderson, *supra;* Dodge v. Griswold, 8 N. H. 425; Tappan v. Evans, 11 N. H. 311; Cornell v. Radway, 22 Wis. 260; Clarkson v. De Peyster, 3 Paige, 320; Dunham v. Cox, 10 N. J. Eq. 437-466. The lien on the land, and the right to sell it in satisfaction of the debt, is the basis of the right to have the deed set aside.

This was a suit to set aside a fraudulent conveyance of real estate executed by the judgment debtor, and hence falls within the second class. It follows from what has been said that it was not necessary to issue an execution at all before commencing the present action. Hence it is wholly immaterial that it does not appear that it was directed to the county where the debtor resided. In our view the complaint is good.

Order reversed

2. PREFERENCES [30]

NOTE.—"There is a large class of cases falling under the influence, though not under the language until recent times, of bankruptcy laws, in which conveyances, transfers, and payments by debtors to any of their creditors, even when made with express intent to defeat other creditors equally entitled to payment, have from the beginning been treated as not within the statute of Elizabeth. If one went no further than the statute itself, one might well suppose that here the doctrine of liberal construction had been rejected. Why, it might naturally be asked, were such cases relegated to bankruptcy laws, nay to actual proceedings in bankruptcy or winding-up,—for even the bankruptcy laws do not meet these cases except in bankruptcy proceedings? There is nothing either in the letter or in the spirit in the statute of Elizabeth to require the courts to hold that it has no application to such cases; and yet it has always been held that

30—Under the bankruptcy law preferences are important in several connections. It has seemed desirable to cover here the subject in all its phases, rather than to split it up.

the statute of Elizabeth was not a statute touching bankruptcy or insolvency.

"The explanation of the apparent anomaly sometimes given, that a debtor ought to have the right to pay creditor A in preference to creditor B, if he choose to so, is not satisfactory; for that is virtually saying that the debtor may defraud B. The true explanation appears to be that there existed already, at the time the statute of Elizabeth was passed, an Act of Bankruptcy, and that another Act of the kind was passed in the very same year with our statute. Questions of preference of course fell within either of these other statutes. Still there is reason to regret that the statute of Elizabeth was not so construed as to cover all cases of bankruptcy not deemed to be covered by the bankruptcy laws, such as preferences by an insolvent arising in other proceedings than those of bankruptcy or winding-up." Bigelow on Fr. Conv. (Knowlton's ed.) 73, *et seq.* See also Shelley v. Boothe, *ante*, p. 200.

(a) Being Insolvent

In re HINES

144 Fed. 142

[See this case given *ante*, p. 111.]

(b) Within Four Months

LOESER v. SAVINGS DEPOSIT BANK & TRUST CO.

148 Fed. 975, 78 C. C. A. 597

(Circuit Court of Appeals, Sixth Circuit. November 22, 1906)

LURTON, Circuit Judge. The question in this case is as to whether Mrs. Chadwick's chattel mortgage securing a past indebtedness to the Savings Deposit & Trust Company of $37,000 is invalid as a preference under § 60a of the Bankruptcy Law of July 1, 1898 (30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445]), as amended by Act. Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689].

This mortgage was made April 27, 1904. By an agreement between the parties it was withheld from record until November 22, 1904, on which day the mortgagee took actual possession of the mortgaged property and put the mortgage to record. On December 1, 1904, proceedings in bankruptcy were begun against

Mrs. Chadwick, and in due course she was adjudged a bankrupt. By agreement the mortgaged property was placed in the hands of the bankrupt receiver for purpose of sale, the rights of the mortgagee in the fund to be reserved and adjudicated by the court. Thereupon the bankrupt trustee filed a petition attacking the mortgage as a preference voidable under the bankrupt law. The bank consented to the jurisdiction and entered its appearance, and filed a cross-petition asserting its right to enforce the lien of its said mortgage, and that its claim, when determined, be awarded priority by virtue of the lien of its said mortgage against the fund in the possession of the court, the proceeds of the sale by the trustee of the chattels covered by the mortgage. The District Court denied this relief, and the cross-petitioner has appealed. The property mortgaged included Mrs. Chadwick's entire chattel estate, and consisted of household furniture, china, bric-a-brac, pictures, jewels, an automobile, and all chattels in her residence on Euclid avenue, Cleveland, and in her barns.

The transcript recites that it was conceded by the mortgagee bank on the hearing below:

"That at the time the chattel mortgage was executed by Cassie L. Chadwick, to-wit: April 27, 1904, and delivered to J. C. Hill, its president, that said Cassie L. Chadwick was insolvent, and that said J. C. Hill as president of said bank had reasonable cause to believe at that time that she was insolvent and that such condition existed on the 22d day of November, 1904. It also appeared from the evidence that the effect of enforcing such chattel mortgage, if held valid, will be to enable said bank to obtain a greater percentage of its debt than any other of the bankrupt creditors of the same class."

The concession brings this transfer squarely within the definition of a voidable preference, provided it was such a transfer as under the law of Ohio was "required" to be recorded within the meaning of § 60a of the bankrupt law of 1898 as amended by the act of February 5, 1903. District Judge Tayler, who heard this case in the court below, was of opinion that under the laws of Ohio, the state wherein the mortgaged property was situated, a chattel mortgage is not "required" to be recorded within the meaning of the amendment referred to, and that the preference related to the date of the actual execution of the transfer, and was, therefore, valid as a preference made more than four months before the filing of the petition. To support

this conclusion he cites § 4150, Ohio Rev. St. 1906, Francisco v. Ryan, 54 Ohio St. 307, and In re Shirley, 112 Fed. 301, 50 C. C. A. 252, as to the validity of an unrecorded chattel mortgage "not accompanied by an immediate delivery and followed by an actual and continual change of possession," as against all persons except "creditors of the mortgagor, subsequent purchasers and mortgagees in good faith." To support the proposition that an unrecorded lien, good as between the parties under the law of the state, is good against a bankrupt trustee, if the lien antedates the filing of the petition more than four months, the cases of Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. ed. 956, and Rogers v. Page et al., 140 Fed. 596, 72 C. C. A. 164, decided by this court, are cited. As to the construction of § 60a before the amendment of 1903, Meyer Brothers Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, an opinion arising under the recording statute of Texas, and decided by the Circuit Court of Appeals of the Fifth Circuit, is cited as holding that the law has not been changed by the amendment of February 5, 1903. It must be conceded that, under the settled law of Ohio, this mortgage was valid without recording, as between the parties and became good when recorded against all creditors who had fastened no lien thereon before, questions of actual fraud in withholding it from record out of the way. It must also be conceded that prior to the amendment of the bankrupt law by the amending act of February 5, 1903, the preference, if free from actual fraud, would relate to the date of the making and delivery of the instrument creating it, and, if that date was more than four months before the filing of the petition for adjudication in bankruptcy, the lien would be good against the trustee. Humphrey v. Tatman and Rogers v. Page et al., cited above. Both of the cases last cited arose under preferences given before the amendment of February 5, 1903. What has been the effect of that amendment? This fact was referred to by Mr. Ray of the House Judiciary Committee, who explained the amendment in question, when proposed in Congress, as intended to prevent preferences under unrecorded instruments given more than four months before the filing of the petition. Touching this he said:

"By adding to 'A' a clause which shall be equivalent to that found in § 3B (1) Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. It seems that as § 60A now stands a preferential mortgage may be given and the creditor

preferred, by withholding it from record four months be able to dismiss the trustee suit to recover the same though the paper was actually recorded within the four months period. See In re Wright (D. C. Ga.) 96 Fed. 187; In re Mersman (N. Y.) 7 Am. Bankr. Rep. 46." Volume 35, part. 7, Cong. Record, 6,943.

Before this amendment § 60a read as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

This section, in its original form, was construed in the cases of Humphrey v. Tatman and Rogers v. Page et al., cited above, and in several other reported cases as avoiding no preference which originated under an unrecorded transfer made more than four months before the beginning of bankruptcy proceedings against the maker. Subsequently Mr. Ray became district judge for the Northern District of New York, and in the case styled In re Hunt (D. C.) 139 Fed. 283, he quotes from Collier on Bankruptcy (5th Ed.) p. 453, a statement that the amendment as offered added after the word "required" the words "or permitted," and "that the Senate for some reason struck out these words." Judge Ray, from this history, held that because under the laws of New York an unrecorded conveyance was good as against everybody except subsequent purchasers without notice, that it was not "required" to be recorded in order to be effectual against a bankrupt trustee. Independently of this legislative history, Judge Archbald, in English v. Ross (D. C.) 140 Fed. 630, and the Circuit Court of Appeals for the Eighth Circuit, in First National Bank v. Connett (C. C. A.) 142 Fed. 33, reached an opposite conclusion and held that a recording statute, which required a conveyance or transfer to be recorded to be effectual against a certain class or classes of persons, was a law which "required" the recording of the transfer in question, within the meaning of § 60a as amended. With this conclusion we agree.

Among the reasons which justify this interpretation are these:

(1) A preference which is an act of bankruptcy by § 3 should in an harmonious law be voidable by the trustee. By that section a transfer made by one "while insolvent" of any

portion of his property to one or more of his creditors "with intent to prefer such creditors over his other creditors" is made an act of bankruptcy, and a petition may be filed against such person "within four months after the commission of such act." With respect to the date of the commission of such act of bankruptcy, subdivision (1) of the same section provides that the date from which the four months begins to run shall be "the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property * * * for the purpose of giving a preference as hereinbefore provided, * * * if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment." By § 60a, a definition of a "preference" is given which under § 3 would constitute an act of bankruptcy and by § 60b, a "preference" so defined is made voidable by the trustee. But, as we have seen heretofore, §§ 60a and 60b did not make a preference voidable by the trustee unless the preference, whether under a recorded or unrecorded instrument, was given within four months prior to the filing of a petition in bankruptcy. Thus a "preference" under § 3, as defined by § 60a, might constitute an act of bankruptcy and justify an adjudication if given by an unrecorded instrument more than four months prior to bankruptcy and the preference itself be enforced as a perfectly valid act. The plain purpose of the amendment of § 60a was to bring it into harmony with § 3, by making the same period of time the test as to whether a preference may be avoided by the trustee, under the former, or may constitute an act of bankruptcy under the latter. The construction given to § 3 should be carried forward and given to § 60a as amended; thus bringing them into consistent relations. "The two," said Judge Archbald, in English v. Ross, cited above, "are intimately related, the one in this particular being the basis of and dominating the other, and it is the failure to realize this and to draw them together as they should be that is responsible for any misapprehension. What is thus 'required' in the way of recording in the one is also 'required' as a conveyance in the other and for the same purpose."

(2) The evil to be corrected was that of secret preferences, given by withholding from record instruments which by the

whole policy of recording statutes should be recorded. This evil was pointed out by the author of the amendatory act of 1903 and the object of the amendment of 60a was stated to be the remedying of this evil. The law, as it stood, encouraged such secret liens and preferences, for, if they could be concealed for four months, though acts of bankruptcy, they were not voidable by the trustee. If we say that unless the law of the state where the transfer is made makes void all such transfers as to all the world, that it is not a law which "requires" recording, the evil will continue and judges will continue to bewail the iniquity of a law which makes such a secret transfer an act of bankruptcy and yet holds the preference valid against the bankrupt's estate because made more than four months before starting bankrupt proceedings against the maker. See the lament of Judge Ray In re Hunt, 139 Fed. 286, 287.

(3) Some effect should be given to the amendment of § 60a if the language of the provision will permit. If "required" be construed as applying only to a law which makes every such transfer absolutely void as to all persons, the amendment will be of no effect, for no recording statute, of which we have any knowledge, makes void transfers or conveyances as between the parties and all of them give effect to such instruments as against some classes of persons having actual notice. The amendment would be idle, and the evil sought to be remedied would flourish as before and the legislative purpose be frustrated.

(4) In view of all of the foregoing considerations, we reach the conclusion that the word "required," as used in the amendment, refers to the character of the instrument giving the preference or making the transfer, without reference to the fact that as to certain persons or classes of persons it may be good or bad according to circumstances. If to be valid against certain classes of persons, the law of the state "requires" the constructive notice of registration it is a transfer which under the amendment is "required" to be recorded. This takes account of the purpose and policy of recording acts, remedies the evil which flourished under the law before the amendment, gives effect to the plain purpose of Congress, and gives some effect and force to a provision which would otherwise be meaningless, and brings § 3 and 60a and 60b into harmony of purpose and meaning.

(5) We do not ignore the argument that in § 3 the word "required" is followed by the words "or permitted," and that the latter words are omitted from the amendment, and that the

words "or permitted" were in the act as introduced by the author of the bill and retained in the amendment as it passed the House, but was dropped in the Senate.

It is a fact of which we may take notice that it is common to recording statutes to set out a list of contracts, conveyances, and transfers which may be registered, or as "entitled" or "permitted" registration. But, if an instrument is not "entitled" or "permitted" by law to be recorded, its record is of no effect as constructive notice. The effect of recording statutes is limited to such instruments as the statute permits record of. Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523, 40 L. ed. 688; Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360; 24 Encyclopedia of Law, p. 142, and cases cited. The Ohio statute concerning the recording of chattel mortgages does not require that such mortgages shall be recorded in order to be valid as against the parties or purchasers with notice. Only creditors and purchasers without notice can ignore an unrecorded chattel mortgage, and they cannot do so if there immediately followed a delivery and notorious change of possession. Yet the mortgagor or mortgagee is entitled or "permitted" to record the instrument, though not essential to its validity as against certain classes of persons.

We conclude from the general purpose and policy of recording statutes that the words "or permitted" are of no vital signification in § 3. If the instrument giving the preference is one which is "permitted" to be recorded in order to give it validity as against certain classes of persons, though perfectly valid without record as to other classes, it is an instrument "required" to be recorded within the meaning of the word as there used. The words "required" and "permitted" in the connection used are of synonymous legal meaning. The dropping of the words "or permitted" by the Senate is, therefore, of no vital signification if we are right in regarding § 3 and § 60a as closely connected provisions. It is only in extremely doubtful matters of interpretation that the legislative history of an act of Congress becomes important. If the word "required," as used in §§ 3 and 60a, is used as referring to the character of the instrument giving the preference, and not as to the persons as between whom it may be valid without recording or the persons as to whom it is void for failure to record, the words "or permitted" in § 3 were surplusage, and the Senate might well omit them from the amendment, the plain purpose being to tie the two provisions

together. Why they were omitted from the bill as it finally passed we can only conjecture. If they had been retained, no one would question that the amendment made the preference, constituting an act of bankruptcy by § 3, voidable by the trustee under §§ 60a and 60b. To say that this plain purpose has failed because "or permitted" was inserted by one house and stricken out by the other, would be to make nothing of the amendment. We should so construe the act as to give it vitality if the words of the act will permit.

Under § 4150, Rev. St. Ohio 1906, a mortgage of chattels, not followed by immediate delivery and no actual and notorious change of possession, is "required" to be recorded. Otherwise it is invalid as to some persons and valid as to others. That such a mortgage is "required" by the law of Ohio to be recorded within the meaning of § 60a as amended, we have no doubt.

* * *

The decree of the court below must be reversed, and the case remanded, with direction to proceed in accordance with this opinion.

In re BECKHAUS

RASMUSSEN v. McKEY

177 Fed. 141, 100 C. C. A. 561

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910)

In October, 1907, Beckhaus was adjudged a bankrupt, and respondent came into possession of property consisting of a stock of merchandise, fixtures, book accounts, etc., as the property of the bankrupt. Rasmussen, petitioner here, filed a petition in the District Court, asking that respondent be ordered to surrender the property to the petitioner. The petition was based on a written agreement entered into on March 6, 1907, by Beckhaus, of the first part, Rasmussen, of the second part, and certain of the pre-existing creditors of Beckhaus, of the third part, whereby Beckhaus transferred the property to Rasmussen to hold, use, and ultimately dispose of for the benefit of the first and third parties. On issues joined the District Court found that on March 6, 1907, at and before the time the agreement was made, Beckhaus was insolvent, and so remained; that the agreement was never recorded; that Rasmussen never took notorious, exclusive, or continuous possession of the property, but Beckhaus

was permitted to remain, and did remain, in possession until the petition in bankruptcy was filed and respondent came into possession, first as receiver, and then as trustee; that Beckhaus intended to prefer said third parties, and said third parties had reasonable cause to believe that Beckhaus intended by such transfer to give them a preference; and that the effect of the enforcement of such transfer would be to enable said third parties as creditors of Beckhaus to obtain a greater percentage of their debts than any other of Beckhaus's creditors of the same class. Being of the opinion that the agreement of transfer, within the meaning of § 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1314]), was "required" to be recorded under the law of Illinois, the District Court adjudged that the petitioner take nothing. * * *

§ 1, c. 95, 2 Starr & C. Ann. St. Ill.: "Be it enacted by the people of the state of Illinois, represented in the General Assembly, that no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinbefore directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage."

BAKER, Circuit Judge (after stating the facts as above). 1. On the basis that the Illinois statute, as construed by the courts of the state, does not declare unrecorded chattel mortgages void except as against the rights and interests of innocent purchasers or mortgagees and attachment or execution creditors; that no such "third person" is concerned in these proceedings; and that the respondent has no standing except as the representative of the bankrupt and his general creditors, against whom an unrecorded chattel mortgage is valid—the petitioner contends that the contract here involved (considered as the equivalent of an unrecorded chattel mortgage), having been executed over four months before the petition in bankruptcy was filed, cannot be assailed by the respondent as a voidable

preference, because it was not "required by law" to be recorded within the meaning of amended § 60a.

The contention mainly rests on a comparison of original § 3b with the history of the amendment to § 60a. § 3b provided that the four months within which an act of bankruptcy was available as the basis of a petition against an insolvent should "not expire until four months after the date of the recording, or registering of the transfer * * * when the act consists in having made a transfer * * * for the purpose of giving a preference * * * if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property." The last sentence of § 60a, "Where the preference," etc., was added by the amendment of 1903. As passed by the House the sentence did not end with "required." The continuation was "or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property transferred." These last-quoted words were stricken out by the Senate. Inasmuch as the present case does not involve "possession," but turns wholly upon "recording," the inquiry is limited to the effect of the excision of the words "or permitted" after "required"; and the particular question concerns the soundness of the petitioner's proposition that such excision compels a construction of the amendment as adopted, whereby a chattel mortgage, which a trustee in bankruptcy is assailing as a voidable preference, is not required to be recorded unless an examination of the local law shows that the chattel mortgage, to be impregnable, must be recorded as notice to the persons presently represented by the trustee.

If, as we are inclined to believe, the Court of Appeals for the Sixth Circuit, in In re Loeser (148 Fed. 975), was correct in concluding that "the words 'required' and 'permitted' in the connection used are of synonymous legal meaning," no effect could be attributed to the dropping of the redundant word.

If they are not synonymous, the omission of "permitted" does not imply inevitably (on the basis that no other inference can fairly be drawn) that the lawmakers intended that "required" should be qualified or limited to less than it would have meant if the clause in § 3b and in the original draft of the amendment to § 60a had ended with "required"; for Congress may well have conceived that an insolvent debtor and a diligent creditor were not necessarily to be dealt with in the same way. That

is, in the interest of fair and open dealing by those who do business on credit, it might have been thought that an insolvent debtor who does not cause a chattel mortgage given to some of his creditors, to the exclusion of others, to be recorded, whether recording be "required" or only "permitted" by the local law, should be liable to be thrown into bankruptcy; while the diligent creditor (diligence being usually favored in the law) should be permitted, after four months, to retain his security, if on taking it he did all the law "required." See Little v. Hardware Co. (133 Fed. 874).

Whether the words be deemed synonymous or not, the dropping of "permitted" only eliminated whatever idea pertained to that word—it could not affect "required," for "required" stands full and untouched, without adverb or clause to cut it down. The primal canon of statutory construction is that the language actually used be given its full and fair meaning, that unqualified words be taken without qualification, and that in the absence of ambiguity extraneous matters be not considered. Under this canon probably nothing more can profitably be said than, if recording is required, it is required. If required for any purpose, or without purpose, how can it be said to be not required? If recording be not required, unless required for all purposes, it could never be said to be required where the instrument is valid between the immediate parties without recording.

We are further restrained by what seems to us to be the absurd consequences of any other ruling. If a good-faith second mortgage had been taken, then according to the petitioner's theory the trustee could avoid the preference. But if, as is frequently the case, each mortgage was large enough to exhaust the mortgaged property, why should the trustee consume the free assets in his hands in carrying on one end of a lawsuit between the mortgagees? The trustee could gain nothing for the general creditors whichever way the litigation ended, but would be spending their pittances to benefit a preferred creditor. The same would be true even if the recorded second mortgage was less than the value of the mortgaged property; for, on the hypothesis that the trustee has no right to resist the unrecorded first mortgage on behalf of the general creditors, the surplus above the second mortgage would have to be applied upon the first mortgage. Preferential mortgagees and lienholders are "adverse claimants," entitled to have their rights determined in plenary suits. They seek to withhold or diminish the fund which otherwise

would be shared among the general creditors, and the general creditors are in fact interested in resisting that reduction. Now if the trustee may not assail preferences except in favor of one preferred creditor as against another, and if the general creditors have no interest in such contests except to pray that their fund be not therein completely consumed in costs and fees, the amendment to § 60a not merely failed to accomplish any benefit—it brought about a positive injustice.

When the amended section is read against the background of the nature and purpose of the act, our interpretation, we believe, is confirmed. The act is a national act. It practically supplants the state insolvency laws. We think it clear that Congress recognized the vast sweep of interstate commerce and meant to free interstate traders from the confusion and harassment attendant upon a multiplicity of variant local laws. Therefore the act in all its parts ought to be interpreted in a national view, doing away as far as possible with the variances in the local laws. To release an insolvent debtor from his debts is an act of grace. Through the whole law runs the clear purpose of extending grace only to honest debtors. Honesty, fairness, equity is the whole spirit of the law. Nothing is more abhorrent to equity than deceitful appearances covering secret preferences. So the diligent creditor who obtains security must not help the debtor to be dishonest, unfair, secretive; he can hold his security only on condition that he give his fellow creditors a four-months opportunity to determine whether or not they will file a petition in bankruptcy against the debtor. The openness and fairness of the preferred creditor are made the terms upon which he may retain his preference. In this view the only inquiry is: Does the local law require instruments of the kind in question to be recorded? There is no need of further investigation into the scope or purposes of the local law. There is no concern whether or not the trustee represents innocent purchasers, mortgagees, attachment or execution creditors. No issue is to be made with respect to the validity of the lien claims supposed to be represented by the trustee. § 60b, which authorizes the trustee to "recover the property or its value," says nothing about the representation of the trustee. It is enough on this point that the trustee is trustee, and that the preferred creditor has failed to record the instrument of transfer, if by the local law instruments of that kind are required for any purpose to be recorded.

Only by this interpretation can this national law be administered with anything like uniformity respecting preferences.

2. Even if the true interpretation of § 60a compelled us to decide this case upon the meaning of the Illinois statute, with due regard to the construction thereof by the Illinois courts, we could not agree with the petitioner.

Recording a mortgage of chattels left in the possession of the mortgagor is required "as against the rights and interests of any third person." The term "third person" is broad enough to include everybody outside of the immediate parties to the instrument and their privies. A simple contract creditor who has not obtained a judgment is just as much a "third person," is just as much a stranger to the mortgage, as is the simple contract creditor who has obtained a judgment. Both have the right to enforce payment, if that can be done. The interests of both are prejudiced if the debtor's property is covered by a fraudulent transfer. If at the time of the fraudulent transfer one creditor has obtained a judgment and the other has not, the only difference is that one has proceeded farther than the other in the enforcement of his rights and the protection of his interests. And when it is said that a fraudulent transfer is void only as to judgment creditors the expression means no more than that a creditor cannot seize his debtor's property until he has obtained some process which authorizes the seizure. As stated in Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885:

"The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor."

Our examination of the Illinois cases has led us to conclude that the Illinois courts have not decided, independently of procedure and having regard solely to rights, that simple contract creditors, irrespective of the progress they may have made in suing their debtor, are not "third persons" within the meaning and intent of the recording statute. Indeed, we think that the case of Long v. Cockern [31] goes quite a way towards holding that they are. But at all events we consider that the question

31—128 Ill. 29, 21 N. E. 201.

is open, and that we are therefore at liberty to adopt the construction we believe to be sound and righteous.

The petition to review and revise is dismissed.

(c) Procuring, Suffering or Permitting a Judgment

WILSON BROTHERS v. NELSON

183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. 74

(United States Supreme Court. December 9, 1901)

The Circuit Court of Appeals for the seventh circuit certified to this court the following statement of facts and questions of law. [The facts appear sufficiently in the opinion.] * * *

"The questions of law upon which this court [the Circuit Court of Appeals] desires the advice and instruction of the Supreme Court are:

"1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy, within the meaning of § 3a, subd. (3), of the bankrupt act.

"2. Whether the judgment so entered and the levy of the execution thereon was a preference 'suffered' or 'permitted' by the said Nelson within the meaning of clause (3) of § 3a of the bankrupt law.

"3. Whether the failure of Nelson to vacate and discharge the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy."

Mr. Justice GRAY, after stating the facts, delivered the opinion of the court:

On February 5, 1885, Nelson, in consideration of so much money then lent to him by Sarah Johnstone, executed and delivered to her his promissory note for the sum of $8,960, payable in five years, with interest until paid. Attached to that note was an irrevocable power of attorney, executed by Nelson, in the usual form, authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. The interest on the note was paid until November 1, 1898. At that date Nelson, as he well knew, was, and long had been, and ever since continued to be, insolvent. On November 21, 1898, Sarah

Johnstone caused judgment to be duly entered in a court of Wisconsin upon the note and the warrant of attorney for the face of the note and costs. Upon that judgment, execution was issued to the sheriff, who on the same day levied on Nelson's goods, and on December 15, 1898, sold the goods by auction, and applied the proceeds thereof in part payment of the judgment. This proceeding left Nelson without means to meet any other of his obligations. The judgment was entered and the levy made without the procurement of Nelson and without his knowledge or consent. The judgment and levy were unassailable in law, and could not have been vacated or discharged by any legal proceedings, except by his voluntary petition in bankruptcy. On December 10, 1898, a petition in bankruptcy was filed against Nelson; and the questions certified present, in various forms, the question whether Nelson committed an act of bankruptcy within the meaning of § 3, cl. 3, of the bankrupt act of 1898.

In considering these questions, strict regard must be had to the provisions of that act, which, as this court has already had occasion to observe, differ in important respects from those of the earlier bankrupt acts. Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; Wall v. Cox, 181 U. S. 244, 45 L. ed. 845, 21 Sup. Ct. Rep. 642; Pirie v. Chicago Title & T. Co., 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

In § 3 of the bankrupt act of July 1, 1898, c. 541, acts of bankruptcy are defined as follows: "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." [30 Stat. at L. 544.]

In the first and second of these an intent on the part of the

bankrupt, either to hinder, delay, or defraud his creditors, or to prefer over other creditors, is necessary to constitute the act of bankruptcy. But in the third, fourth, and fifth no such intent is required.

The third, which is that in issue in the case at bar, is in these words: "(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference."

By the corresponding provision of the bankrupt act of 1867, any person who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, "procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors," "or with the intent, by such disposition of his property, to defeat or delay the operation of this act," was deemed to have committed an act of bankruptcy. Act of March 2, 1867, c. 176, § 39, 14 Stat. at L. 536; Rev. Stat. § 5021.

The act of 1898 differs from that of 1867 in wholly omitting the clauses, "with intent to give a preference to one or more of his creditors" or "to defeat or delay the operation of this act;" and in substituting for the words "procures or suffers his property to be taken on legal process," the words "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," and not having, five days before a sale of the property affected, "vacated or discharged such preference."

There is a similar difference in the two statutes in regard to the preferences declared to be avoided.

The act of 1867 enacted that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, "with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution," or makes any payment, pledge, or conveyance of any part of his property, the person receiving such payment, pledge, or conveyance, or to be benefited thereby, "or by such attachment," having reasonable cause to believe that such person is insolvent and that the same is made in fraud of this act, the same should be void and the assignee might recover the prop-

erty. Act of March 2, 1867, c. 176, § 35, 14 Stat. at L. 534; Rev. Stat. § 5128.

The corresponding provisions of the act of 1898 omit the requisite of the act of 1867, "with a view to give a preference."

§ 60 of the act of 1898, relating to "preferred creditors," begins by providing that "a person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

§ 67, relating to "liens," provides, in subd. *c*, as follows: "A lien created by, or obtained in, or pursuant to, any suit or proceeding at law or in equity, including an attachment upon mesne process, or a judgment by confession, which was begun against a person within four months before the filing of the petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, or [and] that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act."

The same section provides, in subd. *f*, "that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt." This provision evidently includes voluntary, as well as involuntary, bankrupts; for the 1st clause of the 1st section of the act, defining the meaning of words and phrases used in the act, declares that " 'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition."

Taking together all the provisions of the act of 1898 on this subject, and contrasting them with the provisions of the act of 1867, there can be no doubt of their meaning.

The 3d clause of § 3, omitting the word "procure," and the phrase "intent to give a preference," of the former statute,

makes it an act of bankruptcy if the debtor has "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," and has not "vacated or discharged such preference" five days before a sale of the property. By § 60 he is "deemed to have given a preference" if, being insolvent, he has "suffered a judgment to be entered against himself in favor of any person, * * * and the effect of the enforcement of such judgment * * * will be to enable any one of his creditors to obtain a greater percentage of his debt" than other creditors. By § 67, subd. *c*, a lien obtained in any suit, "including an attachment upon mesne process, or a judgment by confession," begun within four months before the filing of the petition in bankruptcy, is dissolved by the adjudication in bankruptcy, not only if "such lien was sought and permitted in fraud of the provisions of this act," but also if "its existence and enforcement will work a preference." And by subd. *f* of the same section "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent," within the four months, shall be deemed null and void in case he is adjudged a bankrupt.

The act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact.

In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, "suffered or permitted" a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors; and the lien obtained by which, in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy, because "its existence and enforcement will work a preference." And the debtor did not, within five days before the sale of the property on execution, vacate or discharge such preference, or file a petition in bankruptcy. By failing to do so, he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate.

The cases on which the appellee relies, of Wilson v. City Bank, 17 Wall. 473, 21 L. ed. 723; Clark v. Iselin, 21 Wall. 360, 22 L. ed. 568; and Tenth Nat. Bank v. Warren, 96 U. S. 539, 24 L.

ed. 640, have no application, because they were decided under the act of 1867, which expressly required the debtor to have acted with intent to give a preference.

The case of Buckingham v. McLean, 13 How. 150, 14 L. ed. 90, arose under the still earlier Bankrupt Act of August 19, 1841, c. 9, § 2 (5 Stat. at L. 442). And the point there decided was that a power of attorney to confess a judgment was an act of the bankrupt creating a "security," which that bankrupt act in express terms declared void only if made in contemplation of bankruptcy and for the purpose of giving a preference or priority over general creditors.

The careful change in the language of the provisions of the Bankrupt Act of 1898 from those of the former Bankrupt Acts upon the subject must have been intended by congress to prevent a debtor from giving a creditor an irrevocable warrant of attorney which would enable him, at any time during the insolvency of the debtor, and within four months before a petition in bankruptcy, to obtain a judgment and levy the execution on all the property of the bankrupt, to the exclusion of his other creditors.

The answer to the second and third questions certified must be that the judgment so entered and the levy of the execution thereon were a preference "suffered or permitted" by Nelson, within the meaning of clause 3 of § 3 of the bankrupt act; and that the failure of Nelson to vacate and discharge, at least five days before the sale on execution, the preference so obtained, was an act of bankruptcy; and it becomes unnecessary to answer the first question.

Second and third questions answered in the affirmative.[32]

CITIZENS BANKING CO. v. RAVENNA NAT. BANK

234 U. S. 360, 58 L. ed. 1352, 34 Sup. Ct. 806

(United States Supreme Court. June 8, 1914)

Mr. Justice VAN DEVANTER delivered the opinion of the court:

Upon a petition filed in the District Court for the Northern District of Ohio by one of her creditors, Cora M. Curtis was ad-

32—The CHIEF JUSTICE, Mr. Justice SHIRAS, Mr. Justice BREWER, and Mr. Justice PECKHAM dissented. The dissenting opinion by Mr. Justice SHIRAS is omitted.

In Duncan v. Landis, 106 Fed.

judged a bankrupt. In addition to matters not requiring notice, the petition charged that within four months next preceding its filing the respondent committed an act of bankruptcy, in that (a), while insolvent, she suffered and permitted the Citizens Banking Company to recover a judgment against her for $1,598.78 and costs, in the Common Pleas Court of Erie County, Ohio, and to have an execution issued under the judgment and levied on real estate belonging to her, whereby the company obtained a preference over her other creditors, and (b) at the time of the filing of the petition, which was one day less than four months after the levy of the execution, she had not vacated or discharged the levy and resulting preference.

The company appeared in the bankruptcy proceedings and challenged the petition on the ground that it disclosed no act of bankruptcy, but the court, deeming that such an act was charged, overruled the objection, and, there being no denial of the facts stated in the petition, adjudged the respondent a bankrupt. The company appealed to the Circuit Court of Appeals, and that court, having briefly reviewed the opposing views touching the point in controversy (121 C. C. A. 250, 202 Fed. 892), certified the case here, with a request that instruction be given on the following questions:

"(1) Whether the failure by an insolvent judgment debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a 'final disposition of the property' affected by the levy, under the provisions of § 3a (3) of the bankruptcy act of 1898 [30 Stat. at L. 546, c. 541, U. S. Comp. Stat. 1901, p. 3422].

"(2) Whether an insolvent debtor commits an act of bankruptcy, rendering him subject to involuntary adjudication as a bankrupt under the bankruptcy act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate."

It will be observed that no reference is made to an accomplished or impending disposal of the property in virtue of the levy, although the mode of disposal prescribed by the local law is by advertisement and sale. 2 Bates's Anno. Stat. (Ohio) §§ 5381, 5393.

839, the Court of Appeals for the Third Circuit, by a vote of two to one, had arrived at the same conclusion as the dissenting Justices above.

The answers to the questions propounded turn upon the true construction of § 3a (3) of the bankruptcy act, which declares:

"Acts of bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." 30 Stat. at L. 544, c. 541, U. S. Comp. Stat. 1901, p. 3418.

Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution, or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. All this is freely conceded by counsel for the petitioning creditor.

The questions propounded assume the existence of the first two elements, and are intended to elicit instruction respecting the proper interpretation of the clause describing the third; namely, "and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference." It is to this point that counsel have addressed their arguments.

Without any doubt this clause shows that the debtor is to have until five days before an approaching or impending event within which to vacate or discharge the lien out of which the preference arises. What, then, is the event which he is required to anticipate? The statute answers, "a sale or final disposition of any property affected by such preference." As these words are part of a provision dealing with liens obtained through legal proceedings, and as the enforcement of such a lien usually consists in

selling some or all of the property affected, and applying the proceeds to the creditor's demand, it seems quite plain that it is to such a sale that the clause refers. And as there are instances in which the property affected does not require to be sold, as when it is money seized upon execution or attachment, or reached by garnishment, * * * it seems equally plain that the words "or final disposition" are intended to include the act whereby the debtor's title is passed to another when a sale is not required. No doubt, the terms "sale or final disposition," explained as they are by the context, are comprehensive of every act of disposal, whether by sale or otherwise, which operates as an enforcement of the lien or preference.

But we do not perceive anything in the clause which suggests that the time when the lien is obtained has any bearing upon when the property must be freed from it to avoid an act of bankruptcy. On the contrary, the natural and plain import of the language employed is that it will suffice if the lien is lifted five days before a sale or final disposition of any of the property affected. This is the only point of time that is mentioned, and the implication is that it is intended to be controlling.

To enforce a different conclusion counsel for the petitioning creditor virtually contends that the clause has the same meaning as if it read, "and having failed to vacate or discharge the preference at least five days before a sale or final disposition of any of the property affected, or, at most, not later than five days before the expiration of four months after the lien was obtained." But we think such a meaning cannot be ascribed to it without rewriting it, and that we cannot do. The contention puts into it an alternative which is not there, either in terms or by fair implication, and to which Congress has not given assent. Indeed, it appears that in the early stages of its enactment the bankruptcy bill contained a provision giving the same effect to a failure to discharge the lien within a prescribed period after it attached as to a failure to discharge it within a designated number of days before an intended sale; and that during the final consideration of the bill that provision was eliminated and the one now before us was adopted. This, of course, lends strength to the implication otherwise arising that the clause names the sole test of when the lien must be vacated or discharged to avoid an act of bankruptcy.

The contention to the contrary is sought to be sustained by a reference to §§ 3b, 67c, and 67f. But we perceive noth-

ing in those sections to disturb the plain meaning of § 3a (3). It defines a particular act of bankruptcy, and purports to be complete in itself, as do other subsections defining other acts of bankruptcy. § 3b deals with the time for filing petitions in bankruptcy and limits it to four months after the act of bankruptcy is committed. It says nothing about what constitutes an act of bankruptcy, but treats that as elsewhere adequately defined. §§ 67c and 67f deal with the retrospective effect of adjudications in bankruptcy, the former declaring that certain liens obtained in suits begun within four months before the filing of the petition shall be dissolved by the adjudication, and the latter that certain levies, judgments, attachments, and other liens obtained through legal proceedings within the same period shall become null and void upon the adjudication. Both assume that the adjudication will be grounded upon a sufficient act of bankruptcy, as elsewhere defined, and give to every adjudication the same effect upon the liens described, whether it be grounded upon one act of bankruptcy or another. And what is more in point, there is no conflict between § 3a (3) and the sections indicated. All can be given full effect according to their natural import without any semblance of interference between § 3a (3) and the others.

But it is said that unless § 3a (3) be held to require the extinguishment of the lien before the expiration of four months from the time it was obtained the result will be that in some instances the lien will not be dissolved or rendered null through the operation of §§ 67c and 67f, because occasionally the full four months will intervene before an act of bankruptcy is committed, and therefore before a petition can be filed. Conceding that this is so, it proves nothing more than what is true of all liens obtained through legal proceedings more than four months prior to the filing of the petition. And while it may be true, as is suggested, that if the debtor is not restricted to less than four months within which to extinguish the lien there will be instances in which general creditors will be affected disadvantageously, it must be reflected that there also will be instances in which an honest and struggling debtor will be able to extinguish the lien the requisite number of days before a sale or final disposition of any of the property affected, and thereby to avoid bankruptcy, without injury to any of his creditors. But with this we are not concerned. The advantages and disadvan-

tages have been balanced by Congress, and its will has been expressed in terms which are plain and therefore controlling.

Lastly, it is said that the term "final disposition" is not used in the sense hereinbefore indicated, but as denoting the status which a lien acquires through the lapse of four months before the filing of a petition in bankruptcy. This is practically a reiteration of the contention already noticed, but probably is intended to present if from a different angle. It overlooks, as we think, the influence which rightly must be given to the context, and also the manifest inaptness of the term to express the thought suggested. When one speaks of a sale or *final* disposition of property, he means by final disposition an act having substantially the effect of a sale,—a transfer of ownership and control from one to another,—and especially is this true when he is referring to a sale or final disposition in the enforcement of a lien. We regard it as entirely clear that the term is so used in this instance, and that it signifies an affirmative act of disposal, not a mere lapse of time which leaves the lien intact and still requiring enforcement. To illustrate, let us take the instance of a provisional attachment of real property, which the creditor is not entitled to enforce unless he sustains the demand which is the subject of the principal suit; and let us suppose that the debtor defends against the demand, and that the suit is pending and undetermined four months after the levy. Of course, an adjudication in bankruptcy upon a petition filed thereafter would not disturb the attachment. But could it be said that the property attached was finally disposed of at the end of the four months? An affirmative answer seems quite inadmissible.

We conclude that both of the questions propounded by the Circuit Court of Appeals should be resolved in the negative.

As shown by the reported cases, some diversity of opinion has arisen in other Federal courts in disposing of similar questions (Re Rome Planing Mill, 96 Fed. 812, 815; Re Vastbinder, 126 Fed. 417, 420; Re Tupper, 163 Fed. 766, 770; Re Windt, 177 Fed. 584, 586; Re Crafts-Riordon Shoe Co., 185 Fed. 931, 934; Folger v. Putnam, 114 C. C. A. 513, 194 Fed. 793, 797; Re Truitt, 203 Fed. 550, 554), and so we deem it well to observe that the conclusion here stated has been reached only after full consideration of those cases.

Questions answered "No."

(d) Transfer of Bankrupt's Property

JAQUITH v. ALDEN

189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. 649

(United States Supreme Court. April 27, 1903)

Statement by Mr. Chief Justice FULLER:

F. N. Woodward *et al.* filed their petition in bankruptcy, and were adjudicated bankrupts November 26, 1901. They had become insolvent August 15, and on that day were not indebted to G. Edwin Alden, who afterwards, in ignorance of the insolvency, made sales to Woodward *et al.*, and received payments from them therefor in the regular course of business, and without any idea or intention on the part of Alden of obtaining a preference thereby, the sales and payments being as follows:

Sales

Aug.	17, 1901.	Rubber		$289.46
	28, "	"		657.89
Sept.	30, "	"		644.28
Oct.	18, "	"		535.99
Oct.	18, "	Cartage		.50
	31, "	Asbestine		10.40

Payments

Sept.	4, 1901.	Payment of bill Aug. 17	$289.46
Sept.	28, 1901.	Payment of bill Aug. 28	657.89
Oct.	29, 1901.	Payment of bill Sept. 30	644.28

The merchandise sold Woodward *et al.* was manufactured by them, and the result of the transactions was to increase their estate in value. Alden petitioned to be allowed to prove his claim of $546.89.

The referee disallowed the claim unless at least the amount of $633.88 was surrendered to the estate. The district judge reversed the judgment of the referee and allowed the claim, and the decree of the District Court was affirmed by the Circuit Court of Appeals (118 Fed. 270) on the authority of Dickson v. Wyman, 55 L. R. A. 349, 49 C. C. A. 574, 111 Fed. 726. Thereupon an appeal to this court was allowed and a certificate granted under § 25, *b*, 2.

Mr. Chief Justice FULLER delivered the opinion of the court:

The facts found established that on August 15 the aggregate

of the property of the bankrupts was not, at a fair valuation, sufficient in amount to pay their debts, but that Alden was ignorant of this, and, in good faith and in the regular course of business, sold material to the bankrupts, and received payment therefor several times between August 15 and November 26, when the petition was filed, on which day the amount of $546.89 for material delivered shortly before had not been paid. All the material so sold to them was manufactured by the bankrupts, and increased their estate in value.

The question is whether the payments made to Alden (or either of them) were preferences within § 60 of the bankruptcy act of 1898 [30 Stat. at L. 562, c. 541, U. S. Comp. Stat. 1901, p. 3445], which must be surrendered, under § 57*g*, before his claim could be allowed. * * *

In Pirie v. Chicago Title & T. Co., 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906, the Circuit Court of Appeals for the Seventh Circuit had affirmed an order of the District Court for the Northern District of Illinois, rejecting a claim of Carson, Pirie, & Company against the estate of Frank Brothers, bankrupts, and the case was then brought to this court on findings of fact and conclusions of law of the Circuit Court of Appeals, made and filed "pursuant to the requirements of subdivision 3, rule 36 of General Orders in Bankruptcy." The first three of the findings were as follows:

"First. That on February 11, 1899, August Frank, Joseph Frank, and Louis Frank, trading as Frank Brothers, were duly adjudged bankrupts.

"Second. That for a long time prior thereto appellants carried on dealings with the said bankrupt firm, said dealings consisting of a sale by said appellants to said Frank Brothers of goods, wares, and merchandise amounting to the total sum of $4,403.77.

"Third. That said appellants, in the regular and ordinary course of business, and within four months prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares, and merchandise so sold and delivered to said Frank Brothers, the sum of $1,336.79, leaving a balance due, owing and unpaid, amounting to $3,093.98."

It was further found that, at the time this payment was made, Frank Brothers were hopelessly insolvent, to their knowledge; but that Carson, Pirie, & Company had no knowledge of such

insolvency, nor had reasonable cause to believe that it existed; nor did they have reasonable cause to believe that the bankrupts, by the payment, intended thereby to give a preference; and that they had refused to surrender to the trustee the amount of the payment made to them by the bankrupts, as a condition of the allowance of their claim. Upon the facts the Circuit Court of Appeals concluded, as matter of law, that the payment made "at the time and in the manner above shown" constituted a preference; and that, by reason of the failure and refusal of Carson, Pirie, & Company to surrender the preference, they were not entitled to prove their claim.

The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within § 60*a*, although the creditor was ignorant of the insolvency, and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class.

In the present case all the rubber was sold and delivered after the bankrupts' property had actually become insufficient to pay their debts, and their estate was increased in value thereby to an amount in excess of the payments made. The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of $546.89, and a loss to the seller of that amount, less such dividends as the estate might pay. In these circumstances the payments were no more preferences than if the purchases had been for cash, and, as parts of one continuous *bona fide* transaction, the law does not demand the segregation of the purchases into independent items so as to create distinct pre-existing debts, thereby putting the seller in the same class as creditors already so situated, and impressing payments with the character of the acquisition of a greater percentage of a total indebtedness thus made up.

We do not think the slight variation in the dates of sales and payments affords sufficient ground for the distinction put forward by counsel between the payments of September 4 and 28 and the payment of October 29 (which he concedes should be upheld) in their relation to the rubber furnished August 17 and

28 and September 30. All the material was sold and delivered after August 15, and neither of the items can properly be singled out as constituting outstanding indebtedness, payment of which operated as a preference.

The facts as found in Pirie v. Chicago Title & T. Co. were so entirely different from those existing here that this case is not controlled by that. In view of similar vital differences it has been held by the Circuit Court of Appeals for the first circuit (Dickson v. Wyman, 55 L. R. A. 349, 49 C. C. A. 574, 111 Fed. 726), second circuit (Re Sagor, 9 Am. Bankr. Rep. 361), third circuit (Gans v. Ellison, 52 C. C. A. 366, 114 Fed. 734), eighth circuit (Kimball v. Rosenham Co., 52 C. C. A. 33, 114 Fed. 85), that payments on a running account, where new sales succeed payments, and the net result is to increase the value of the estate, do not constitute preferential transfers under § 60*a*.

Judgment affirmed.[33]

Mr. Justice WHITE and Mr. Justice McKENNA, not being able to concur in the reasons by which the court, in the opinion just announced, distinguishes this case from that of Pirie v. Chicago Title & T. Co., and deeming the latter case controlling in this, dissent.

NEW YORK COUNTY NATIONAL BANK v. MASSEY

192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. 199

(United States Supreme Court. January 4, 1904)

Mr. Justice DAY delivered the opinion of the court:

This is an appeal from the judgment of the Circuit Court of Appeals for the second circuit, reversing the order of the District Court affirming the order of the referee in bankruptcy, allowing a claim against the estate of Stege & Brother. This claim was allowed against the contention of the trustee of the bankrupt, that it could not be proved until the bank should surrender a certain alleged preference given to it in contravention of the bankrupt act. The Circuit Court of Appeals reversed the order of the District Court, holding that the bank must first surrender the preference before it could be allowed to prove its claim.

33—See Yaple v. Dahl-Millikan Grocery Co., 193 U. S. 526; Wild & Co. v. Trust Co., 153 Fed. 562.

54 C. C. A. 116, 116 Fed. 342. The Circuit Court of Appeals made the following findings of fact:

"For a number of years past the bankrupts, George H. Stege and Frederick H. Stege, were engaged, in the city and county of New York, in the business of dealing in butter, eggs, etc., at wholesale, under the firm name and style of Stege & Brother. On January 27, 1900, they filed a voluntary petition of bankruptcy in the District Court, with liabilities of $67,232.49 and assets of $20,729.66, and upon the same day were duly adjudicated bankrupts. Among their liabilities there was an indebtedness of $40,000 to the New York County National Bank for money loaned upon four promissory notes for $10,000 each. The money was loaned to the bankrupts and the notes were originally given as follows:

"April 26, 1899, $10,000, 6 months, due October 26, 1899.

"April 26, 1899, $10,000, 7 months, due November 26, 1899.

"June 26, 1899, $10,000, 4 months, due October 26, 1899.

"August 2, 1899, $10,000, 4 months, due December 2, 1899.

"None of these notes were paid when they fell due, but were all renewed as follows:

"October 26, 1899, $10,000, 3 months, due January 26, 1900.

"November 26, 1899, $10,000, 75 days, due February 9, 1900.

"October 26, 1899, $10,000, 3 months, due January 26, 1900.

"December 2, 1899, $10,000, 69 days, due February 9, 1900.

"On January 23, 1900, in the morning, the bankrupts went to the New York County National Bank and asked the officers to have the two notes of $10,000 each, which fell due on January 26, extended. The bankrupts at that time informed the bank officers that they were unable to pay the notes then about to fall due. In the afternoon of the same day, January 23, 1900, the bankrupts again called upon the bank officers, and at that time they delivered to them a statement of their assets and liabilities, which statement was not delivered until after the deposit of $3,884.47 had been made on that day. This statement as of January 22, 1900, showed their assets to be $19,095.67 and their liabilities $65,864.61.

"The bankrupts kept their bank account in the New York County National Bank since May 6, 1899. On January 22, 1900, their balance in the bank was $218.50. On the same day they deposited in that account $536.83; on January 23, 1900, $3,884.47; on January 25, 1900, $1,803.95, making a total of $6,225.25 deposited in the three days mentioned. Of this amount

there was left in the bank account on the day of the adjudication in bankruptcy, January 27, 1900, the sum of $6,209.25, the bank having honored a check of Stege Brothers after the date of all these deposits.

"At the first meeting of creditors, February 9, 1900, the New York County National Bank filed its claim for $33,790.25.

"In its proof of claim the bank credited upon one of the notes which became due on January 26, 1900, the deposit of $6,209.25. The claim was allowed by the referee in the sum of $33,750.25, being $40,000 less the amount on deposit in bank ($6,209.25) and a small rebate of interest on the unmatured notes. Some of the creditors at this meeting reserved the right to move to reconsider the claim of the New York County National Bank; the referee granted this request. Afterwards the trustee, as the representative of the creditors, moved before the referee to disallow and to expunge from his list of claims the claim of the New York County National Bank unless it surrendered the amount of the deposit, namely, $6,209.25, which had been credited by the bank upon one of the notes. The referee denied that motion, and an appropriate order was made and entered. The trustee thereupon duly filed his petition to have the question certified to the district judge. The district judge on the 25th day of November, 1901, made an order affirming the order of the referee. From that order an appeal was duly taken by the trustee to the Circuit Court of Appeals. The deposits were made in the usual course of business; at the time they were made Stege Brothers were insolvent."

As a conclusion of law, the Court of Appeals held that the deposit would amount to a transfer enabling the bank to obtain a greater percentage of the debt due to it than other creditors of the same class, and that allowance of the claim should be refused unless the preference was surrendered. This case requires an examination of certain provisions of the bankrupt law. § 68 of that law provides:

"§ 68. Set-offs and counterclaims:

"(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.

"(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate, or (2) was purchased by or transferred to him after

the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."

§ 60 provides (prior to the amendment of February 5, 1903):

"§ 60. Preferred creditors: *a.* A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property, and the effect of the * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

§ 57*g* provides (prior to amendment of February 5, 1903): "Claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Considering, for the moment, § 68, apart from the other sections, subdivisions *a* contemplates a set-off of mutual debts or credits between the estate of the bankrupt and the creditor, with an account to be stated and the balance only to be allowed and paid. Subdivision *b* makes certain specific exceptions to this allowance of set-off, and provides that it shall not be allowed in favor of the debtor of the bankrupt upon an unproved claim or one transferred to the debtor after the filing of the petition in bankruptcy, or within four months before the filing thereof, with a view to its use for the purpose of set-off, with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy. Obviously, the present case does not come within the exceptions to the general rule made by subdivision *b*. It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character. National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897. Or, as defined by Mr. Justice White, in the case of Davis v. Elmira Sav. Bank, 161 U. S. 288, 40 L. ed. 702, 16 Sup. Ct. Rep. 505: "The deposit of money by a customer with his banker is one of loan, with the superadded obligation that the money is to be paid, when demanded, by a check." Scammon v. Kimball, 92 U. S. 369, 23 L. ed. 485. It is true that the findings

of fact in this case establish that at the time these deposits were made the assets of the depositors were considerably less than their liabilities, and that they were insolvent, but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor. The check of the depositor was honored after this deposit was made, and for aught that appears Stege Brothers might have required the amount of the entire account without objection from the bank, notwithstanding their financial condition.

We are to interpret statutes, not to make them. Unless other sections of the law are controlling, or, in order to give a harmonious construction to the whole act, a different interpretation is required, it would seem clear that the parties stood in the relation defined in § 68*a*, with the right to set off mutual debts, the creditor being allowed to prove but the balance of the debt.

§ 68*a* of the bankruptcy act of 1898 is almost a literal reproduction of § 20 of the act of 1867. [14 Stat. at L. 526, c. 176.] So far as we have been able to discover the holdings were uniform under that act that set-off should be allowed as between a bank and a depositor becoming bankrupt. Re Petrie, 7 Nat. Bankr. Reg. 332, 5 Ben. 110, Fed. Cas. No. 11,040; Blair v. Allen, 3 Dill. 101, Fed. Cas. No. 1,483; Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483. In Traders' Nat. Bank v. Campbell, 14 Wall. 87, 20 L. ed. 832, the right of set-off was not relied upon, but a deposit was seized on a judgment which was a preference.

But it urged that under § 60*a* this transaction amounts to giving a preference to the bank, by enabling it to receive a greater percentage of its debts than other creditors of the same class. A transfer is defined in § 1 (25) of the act to include the sale and every other and different method of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. While these sections are not to be narrowly construed so as to defeat their purpose, no more can they be enlarged by judicial construction to include transactions not within the scope and purpose of the act. This section, 1 (25), read with §§ 57*g* and 60*a*, requires the surrender of preferences having the effect of transfers of property "as payment, pledge, mortgage, gift, or security which operate to diminish the estate of the bankrupt and prefer one creditor over another."

The law requires the surrender of such preferences given to the creditor within the time limited in the act before he can

prove his claim. These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor, and the consequent diminution of the bankrupt's estate. It is such transactions, operating to defeat the purposes of the act, which, under its terms, are preferences.

As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. It is true that it creates a debt, which, if the creditor may set it off under § 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of § 68*a*. If this argument were to prevail, it would, in cases of insolvency, defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that, to the extent of the set-off, he is paid in full.

It is insisted that this court in the case of Pirie v. Chicago Title & T. Co., 182 U. S. 438, 48 L. ed. 1171, 21 Sup. Ct. Rep. 906, held a payment of money to be a transfer of property within the terms of the bankrupt act, and when made by an insolvent within four months of the filing of the petition in bankruptcy, to amount to a preference, and that case is claimed to be decisive of this. In the Pirie Case the turning question was whether the payment of money was a transfer within the meaning of the law, and it was held that it was. There the payment of the money within the time named in the bankrupt law was a parting with so much of the bankrupt's estate, for which he received no obligation of the debtor but a credit for the amount on his debt. This was held to be a transfer of property within the meaning of the law. It is not necessary to depart from the ruling made in that case, that such payment was within the operation of the law, while a deposit of money upon an open account subject to check, not amounting to a payment, but

creating an obligation upon the part of the bank to repay upon the order of the depositor, would not be. Of the case of Pirie v. Chicago Title & T. Co., it was said in Jaquith v. Alden, 189 U. S. 78, 82, 47 L. ed. 717, 719, 23 Sup. Ct. Rep. 649,650: "The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within § 60*a*, although the creditor was ignorant of the insolvency, and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class."

In other words, the Pirie Case, under the facts stated, shows a transfer of property to be applied upon the debt, made at the time of insolvency of the debtor, creating a preference under the terms of the bankrupt law. That case turned upon entirely different facts, and is not decisive of the one now before us. It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt, and not a diminution of his estate.

In our opinion the referee and the District Court were right in holding that the amount of the deposit could be set off against the claim of the bank, allowing it to prove for the balance, and the Circuit Court of Appeals, in holding that this deposit amounted to a preference, to be surrendered before proving the debt, committed error.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed; cause remanded to latter court.

Mr. Justice McKENNA dissents.[34]

34—See Studley v. Boylston Nat. Bank, 229 U. S. 523, where the depositor paid the notes by checks drawn on the account.

Cf. In re Starkweather & Albert, 206 Fed. 797; In re National Lumber Co., 212 Fed. 928; Merchants' Nat. Bank v. Ernst, 231 U. S. 60.

THOMPSON v. FAIRBANKS

196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. 306

(United States Supreme Court. February 20, 1905)

The plaintiff in error, by this writ, seeks to review a judgment of the Supreme Court of the State of Vermont in favor of the defendant in error. 75 Vt. 361, 56 Atl. 11. The facts upon which the judgment rests are as follows: On the 30th day of June, 1900, Herbert E. Moore, of St. Johnsbury, in the State of Vermont, filed his voluntary petition in bankruptcy in the United States District Court for the District of Vermont, and on the 3d day of July, 1900, Moore was by the court duly adjudged a bankrupt, and on the 15th of September, 1900, the plaintiff in error was appointed a trustee in bankruptcy of Moore's estate, and duly qualified. He commenced this action in the County Court of Caledonia County, in the State of Vermont, on the first Tuesday of June, 1901, against the defendant Fairbanks, to recover from him the value of certain personal property alleged to have belonged to the bankrupt Moore on the 16th day of May, 1900, and which was, as alleged, sold and converted by Fairbanks, on that day, to his own use, the value of the property being $1,500, as averred in the declaration. The defendant filed his plea and gave notice that upon the trial of the case he would give in evidence and rely upon, in defense of the action, certain special matters set up in the plea. The case was, by order of the County Court, and by the consent of the parties, referred to a referee to hear the cause and report to the court. It was subsequently heard before the referee, who filed his report, finding the facts upon which the decision of the case must rest. He found that before June, 1886, the bankrupt Moore bought a livery stock and business in St. Johnsbury village, in the State of Vermont. At the time of this purchase the defendant was the lessor of the buildings in which the business was conducted, and it continued to be carried on in those buildings. Moore, in making the purchase, had assumed a mortgage then outstanding on the property, and a short time before March 1, 1888, the defendant assisted him to pay this mortgage by signing a note with him for $1,425, payable to the Passumpsic Savings Bank of St. Johnsbury. Subsequently defendant signed notes, which, with accrued interest, were merged in one, dated March 1, 1900, for $2,510.75, due on demand to said savings bank, signed by

the bankrupt and by the defendant as his surety. This note had not been paid when the case was referred to the referee. The defendant also signed other notes payable to the First National Bank of St. Johnsbury, which were merged into one, and, by various payments made by Moore, it was reduced to $525, and on June 4, 1900, it was paid by the defendant. All these notes had been signed by the defendant to assist Moore in carrying on, building up, and equipping his livery stable and livery business, and as between them the notes belonged to Moore to pay. On April 15, 1891, Moore gave the defendant a chattel mortgage on the livery property to secure him for these and other debts and liabilities. The property was described in the mortgage as follows: "All my livery property, consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange."

The condition contained in the mortgage was, that if Moore should "well and truly pay, or cause to be paid, to the said Henry Fairbanks all that I now owe him, or may owe him hereafter by note, book account, or in any other manner, and shall well and truly save the said Henry Fairbanks harmless, and indemnify him from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, indorser, or otherwise, then this deed shall be void; otherwise of force."

This mortgage was acknowledged, and the affidavit, as provided by the Vermont statute, was appended, showing the justice of the debt and the liability contemplated to be secured by the mortgage, and the mortgage was duly recorded on the 18th day of April, 1891, in the St. Johnsbury clerk's office, by the town clerk thereof. On March 5, 1900, Moore gave the defendant another chattel mortgage on this livery stock, which, on March 23, 1900, defendant assigned to the Passumpsic Savings Bank, and that bank has ever since been its holder and owner. This mortgage was given to secure defendant against all his liabilities for Moore.

On the 7th of May, one John Ryan sued out a writ in assumpsit against Moore to recover some $500, and an attachment on the livery stock was levied in that suit by the deputy sheriff. This attachment remained in force until dissolved by the bankruptcy proceedings, and the suit is still pending in the State Court of Vermont.

Under the agreement contained in the chattel mortgage of April, 1891, Moore made sales, purchases, and exchanges of livery stock to such an extent that on March 5, 1900, there only remained of the livery property on hand April 15, 1891, two horses. These sales, exchanges, and purchases were sometimes made by Moore without communication with or advice from the defendant, and frequently after consultation with him. The livery stock, as it existed on May 16, 1900, was all acquired by exchange of the original stock, or with the avails of the old stock, or from the money derived from the business. Some years after the execution of the chattel mortgage of April 15, 1891, Moore became embarrassed, and finally, shortly prior to March 5, 1900, he became and continued wholly insolvent. On May 16, 1900, the defendant, acting under the advice of counsel, and with the consent of Moore, took possession, under the mortgage of April 15, 1891, of all the livery property then on hand, and on June 11, 1900, caused the same to be sold at public auction by the sheriff. It is for the net avails of this sale, amounting to $922.08, which the sheriff paid over to the defendant, that this suit is brought. The Passumpsic Savings Bank on September 15, 1900, proved its note of $2,510.75 as an unsecured claim against the bankrupt estate of Moore, as the mortgage held by the bank as security had been given by Moore in March, 1900, to defendant, and by him assigned to the bank within four months of the filing of the petition in bankruptcy.

For the purpose of defeating the effect of the defendant taking possession of the livery property under his chattel mortgage of April, 1891, the trustee in bankruptcy presented a petition to the United States District Court of Vermont for leave to intervene as plaintiff in the Ryan attachment suit, and to have the lien of Ryan's attachment preserved for the benefit of the general creditors. This petition was dismissed by that court. The referee found that the defendant and his counsel knew, when he took possession of the livery property, under his mortgage, that Moore was insolvent, and was considering going into bankruptcy. The referee also found that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but he did intend thereby to perfect his lien on the livery property, and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose, and he understood at that time that it was probable that the Ryan attachment would hold good as against his mortgage. All the prop-

erty of which defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage of April 15, 1891.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

This is a contest between a trustee in bankruptcy representing the creditors of the bankrupt, and the defendant, the mortgagee in a chattel mortgage dated and executed April 15, 1891, and duly recorded April 18 of that year. The defendant has paid some $500 of the indebtedness of the bankrupt for which defendant was liable as indorser on a note, and he remains liable to pay the note of $2,510.75, held by the Passumpsic Savings Bank, which was signed by him as surety.

The property taken possession of by the defendant under the chattel mortgage was sold by a deputy sheriff on the 11th of June, 1900, and the net avails of the sale, amounting to $922.08, have been paid over by the officer who made the sale, to the defendant.

This suit is brought by the trustee to recover from the defendant those net avails on the theory that the action of the defendant in taking possession and making the sale of the property was unlawful under the provisions of the bankrupt act.

The defendant had assisted the bankrupt in the purchase of the property and had indorsed notes for him in order to enable him to carry on the business of conducting a livery stable. This mortgage, to secure him for these payments and liabilities, was given some seven years before the passage of the bankrupt act, and at the time it was given it was agreed by the parties to it that the bankrupt might sell or exchange any of the livery stock covered by it, as he might desire, and should, by purchase or exchange, keep the stock good, so that the defendant's security should not be impaired, and it was also agreed that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein.

* * *

There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the de-

fendant would have the right to take possession of property subsequently acquired, as provided for in the mortgage. The bankrupt was, therefore, not holding himself out as unconditional owner of the property, and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien, and if defendant cannot secure the benefit of this mortgage, which he obtained in 1891, as a lien upon the after-acquired property, yet prior to the title of the trustee for the benefit of creditors, it must be because of some provision of the bankruptcy law, which we think the court ought not to construe or endeavor to enforce beyond its fair meaning.

In Vermont it is held that a mortgage such as the one in question is good. The Supreme Court of that state has so held in this case, and the authorities to that effect are also cited in the opinion of that court. And it is also there held that when the mortgagee takes possession of after-acquired property, as provided for in this mortgage, the lien is good and valid as against every one but attaching or judgment creditors prior to the taking of such possession.

At the time when the defendant took possession of this after-acquired property, covered by the mortgage, there had been a breach of the condition specified therein, and the title to the property was thereby vested in the mortgagee, subject to the mortgagor's right in equity to redeem. This has been held to be the law in Vermont (aside from any question as to the effect of the bankrupt law), both in this case and in the cases also cited in the opinion of the Supreme Court of Vermont. The taking of possession of the after-acquired property, under a mortgage such as this, is held good, and to relate back to the date of the mortgage, even as against an assignee in insolvency. Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781, and other cases cited in the opinion of the Supreme Court.

Whether and to what extent a mortgage of this kind is valid is a local question, and the decisions of the state court will be followed by this court in such case. Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 308.

The question that remains is whether the taking of possession, after condition broken, of these mortgaged chattels before although within four months of filing the petition in bankruptcy, was a violation of any of the provisions of the bankrupt act.

The trustee insists that such taking possession of the after-

acquired property, under the mortgage of 1891, constituted a preference under that act. He contends that the defendant did not have a valid lien against creditors, under that act; that his lien might, under other circumstances, have been consummated by the taking of possession, but, as that was done within four months of the filing of the petition in bankruptcy, the lien was not valid.

Did this taking of possession constitute a preference within the meaning of the act?

It was found by the referee that when the defendant took possession of the property he knew that the mortgagor was insolvent and was considering going into bankruptcy, but that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but did intend thereby to perfect his lien on the property, and make it available for the payment of his debts before other complications, by way of attachment or bankruptcy, arose. He then understood that Ryan's attachment would probably hold good against his mortgage. The question whether any conveyance, etc., was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a Federal nature. McKenna v. Simpson, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; Cramer v. Wilson, 195 U. S. 408, 25 Sup. Ct. Rep. 95, 49 L. ed. 256. It can scarcely be said that the enforcement of a lien by the taking possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage, is a conveyance or transfer within the bankrupt act. There is no finding that, in parting with the possession of the property, the mortgagor had any purpose of hindering, delaying, or defrauding his creditors, or any of them. Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property within the provisions of § 67*e* of the bankruptcy law. Sabin v. Camp, 98 Fed. 974.

In the case last cited the court, upon the subject of a preference, held that though the transaction was consummated within the four months, yet it originated in October, 1897, and there was no preference under the facts of that case. "What was done was in pursuance of the pre-existing contract, to which no objection is made. Camp furnished the money out of which the property, which is the subject of the sale to him, was created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property purchased by his money is a legitimate security, and one frequently

employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights, under this valid and equitable arrangement, to possess himself of the property, and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet, if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act by virtue of which mortgage, and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not, in such circumstances, occupy the same position as a creditor levying under an execution, or by attachment, and his rights, in this exceptional case, and for the reasons just indicated, are

somewhat different from what they are generally stated. Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

It is admitted on the part of the counsel for the plaintiff in error that the rule in Vermont, in cases of chattel mortgages of after-acquired property (where possession by the mortgagee is necessary to perfect his title as against attaching or execution creditors), is that, although such possession be not taken until long after the execution of the mortgage, yet the possession, when taken (if it be before the lien of the attaching or execution creditor), brings the property under the cover and operation of the mortgage as of its date,—the time when the right of possession was first acquired. It was also admitted that the Supreme Court of Vermont has held that when a chattel mortgage requiring possession of the mortgaged property to perfect it as to third persons was executed more than four months before the commencement of insolvency proceedings, the taking of actual possession of the mortgaged property within the four months' period brought that property under the mortgage as of its date, and so did not constitute a preference voidable by the trustee, although the other elements constituting a preference were present. Many decisions of the Supreme Court of Vermont are cited to this effect. It will be observed, also, that the provisions of the state insolvency law in regard to void and voidable preferences and transfers were identical with similar provisions of the bankruptcy act of 1867. Gilbert v. Vail, 60 Vt. 261, 14 Atl. 542.

Under that law it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that "except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens, and encumbrances thereon, whether created by his act or by operation of law." Yeatman v. New Orleans Sav. Inst., 95 U. S. 764, 24 L. ed. 589. See also Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075. Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or

encumbrance of the property which is void as against the trustee by some positive provision of the act. Re Garcewich, 53 C. C. A. 510, 115 Fed. 87, 89, and cases cited.

It is true that in the case in 95 U. S. 764, 24 L. ed. 589, the savings institution had a special property in the certificates which were the subject of dispute, and had possession of them at the time of the bankruptcy proceedings, and it was held that the institution was not bound to return them, either to the bankrupt, the receiver, or the assignee in bankruptcy, prior to the time of the payment of the debt for which the certificate was held. So the state court held in this case, where the defendant took possession under the circumstances detailed, by virtue of his mortgage, and where he had the legal title to the property mortgaged, after condition broken, that the possession thus taken related back to the date of the giving of the mortgage, and in thus enforcing his lien there was not a violation of any of the provisions of the bankruptcy act.

In Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74, it was held that the bankrupt had committed an act of bankruptcy, within the meaning of the bankrupt law, by failing, for at least five days before a sale on the execution issued upon the judgment recovered, to vacate or discharge the judgment, or to file a voluntary petition in bankruptcy. The judgment and execution were held to have been such a preference, "suffered or permitted" by the bankrupt, as to amount to a violation of the bankrupt act. Although the judgment was entered upon the power of attorney given years before the passage of the bankrupt act, it was nevertheless regarded as "suffering or permitting" a preference, within that act. This is not such a case. As we have said, there is no finding that the defendant had reasonable cause to believe that by the change of possession it was intended to give a preference. As the state court has said, it was rather a recognition of what was regarded as a right under the previous agreement contained in the mortgage.

Nor does the existence of the Ryan attachment, or the chattel mortgage of March 5, 1900, executed by the bankrupt, and delivered to the defendant, and by him assigned, on the 23d of March, 1900, to the bank, create any greater right or title in the trustee than he otherwise would have. The trustee moved under § 67*f*, [30 Stat. at L. 565, c. 541, U. S. Comp. Stat. 1901, p. 3450], on notice to the defendant, for an order that the

right or lien under the Ryan attachment should be preserved, so that the same might pass to the trustee for the benefit of the estate, as provided for in that section. This was denied. And unless such permission had been granted, the lien of the attachment was not preserved by the act, but, on the contrary, it was dissolved under § 67*c*.

The mortgage assigned to the bank, and the attachment obtained by Ryan, having been dissolved by the bankrupt proceedings, the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given, or attachment levied. This is the view taken by the state court of the effect of the dissolution of the mortgage and attachment liens under the bankrupt act, and we think it is the correct one. It is stated in the opinion of the state court as follows:

"It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of § 67*f*. There would be more force in this contention were it not for the provision that, by order of the court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for, on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such order is necessary. We think such is the purpose of that provision, and that unless the lien is preserved, the property, as in the case at bar, may be held upon some other lien, and not pass to the trustee. Re Sentenne & Green Co., 120 Fed. 436."

We think the judgment of the Supreme Court of Vermont was right, and it is affirmed.[35]

In re CUTTING

145 Fed. 388

(District Court, W. D. New York. May 7, 1906)

HAZEL, District Judge. The report of the special master herein finds that the alleged bankrupt, Benjamin W. Cutting,

35—*Cf.* In re Reynolds, 153 Fed. 295. See Security Warehousing Co. v. Hand, 206 U. S. 415, 423; Taney v. Penn Nat. Bank, 232 U. S. 174.

committed an act of bankruptcy in transferring, while insolvent, certain personal property, by executing and delivering chattel mortgages thereon, with intent to create an unlawful preference under the bankrupt act. The undisputed facts are as follows: The opposing creditors, Lazell & Co., at different times, beginning in the year 1899, loaned and advanced money to the bankrupt, accepting as security therefor a chattel mortgage upon specified personal property. Such chattel mortgage was executed and delivered on April 24, 1901, and on February 8, 1902, another mortgage was given in renewal thereof to secure amounts due and to become due covering the property specified in the former mortgage. Subsequently, on March 12 and 13, 1903, respectively, the debtor gave to said secured creditors two chattel mortgages to secure the sum of about $3,000, the amount then due, as appears by the testimony of Cutting, which mortgages covered the property theretofore mortgaged to them, and in addition a so-called Hartman machine, not enumerated in the prior incumbrance. The mortgage liens were duly recorded or filed in the town clerk's office, as required by the statute of the state. It is claimed, however, that the mortgages of March 12 and 13, 1903, were not continued of force against the creditors of the mortgagor or subsequent purchasers or mortgagees in good faith, in that c. 528, p. 460, of the Laws of 1896, which requires that a statement describing the mortgage, and the time and place of its filing, be filed within the 30 days, was not complied with. There exists some contrariety of decisions in relation to the effect of an omission to strictly comply with the provisions of the statute as to whether a mortgage ceased to be valid against a creditor at large of the mortgagor, or if a creditor must be in a situation to seize the mortgaged property pursuant to a lien upon it. This proposition I conceive to be definitely decided in the Matter of New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, where the state court authorities are cited and examined by the Circuit Court of Appeals for this circuit, and which holds that:

"Only such creditors can take advantage of it [the statute] as are armed with some legal process authorizing the seizure of the mortgaged property, and are thereby in a position to enforce a lien upon it."

The cases hold that a trustee in bankruptcy takes the property in the same plight and condition that the bankrupt himself held it, assuming the transaction free from fraud and subject to

the existing equities. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. ed. 577. And as between the alleged bankrupt and the mortgagees, giving due consideration to the facts of this case, it is thought that the mortgages in question were neither void nor fraudulent. The contesting creditors contend that such mortgages were practically renewals and covered the identical property; that they were not void as against the mortgagees, though given as collateral security for a pre-existing debt owing from the bankrupt, and no statement having been filed in accordance with the state enactment mentioned. The evidence satisfies me that the transaction was not in bad faith, and that no intention existed to defeat the operation of the bankrupt act. Hence, it is immaterial that Cutting was, or that the mortgagees had reason to believe him, insolvent. The bankrupt act does not forbid the giving of other or different security within the four months period to replace security previously given, if such security is a valid one and of equal value as that previously given. The mortgagor might have surrendered the possession of the property of the mortgagees just prior to making the new mortgages. Indeed, the mortgagees could legally have taken possession thereof in payment of their lien, though there had been no compliance with the statute regarding refiling. As said in Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235:

"The mortgage covered the same property. It embraced nothing more. It withdrew nothing from the control of the bankrupt, or from the reach of the bankrupt's creditors, that had not been withdrawn by the bill of sale. Giving the mortgage in lieu of the bill of sale, as was done, was therefore a mere exchange in the form of the security. In no sense can it be regarded as a new preference. The preference, if any, was obtained on the 15th of May, when the bill of sale was given, more than four months before the petition in bankruptcy was filed. It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankrupt law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it."

This language, in a case where the facts were only slightly

different, is not thought inapplicable here. It was held in Re Shepherd, 6 Am. Bankr. Rep. 725, that where a new chattel mortgage, which was duly recorded, was given within four months of filing the petition, in place of a prior mortgage and for a valuable consideration, the new mortgage operates as a continuance of the prior incumbrance, and, as no lien intervened before the bankruptcy, there was no illegal preference. In Asbury Park Building & Loan Association v. Shepherd, 6 Am. Bankr. Rep. 725, it is stated that:

"The mere exchange of securities within four months is not a preference within the meaning of the bankrupt law; the reasons being that the change takes nothing from the other creditors."

There a new mortgage was substituted for a prior security within four months of the filing of the petition in bankruptcy. The facts of that case are similar to those here presented. See, also, Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816. In this case the same property was included in the mortgages given by Cutting to replace prior ones to secure an indebtedness already existing, and, as already stated, in addition thereto the Hartman machine, which inclusion was warranted by a present consideration of $125, subsequently used by the bankrupt in payment of insurance. True, the referee found that the later mortgage included property not enumerated in the earlier, but a careful comparison of the two instruments indicates otherwise. Various of the items were a little differently described, but the schedule of personal property attached to the mortgage reasonably identifies the articles as practically the same, with the exception of the Hartman machine and the offspring of the stock mentioned in the earlier mortgage.

* * *

The mortgages to Taylor & Wakeman, claimed to have been unlawful transfers in contravention of the bankrupt act, were also executed and delivered by the bankrupt as substitutes for prior unpaid mortgage liens, and come under the views herein expressed.

* * *

The petition for adjudication of Benjamin W. Cutting as a bankrupt is therefore dismissed. So ordered.[36]

36—*Cf.* Becker Co. v. Gill, 206 Fed. 36.

In re GREAT WESTERN MFG. CO.

152 Fed. 123, 81 C. C. A. 341

(Circuit Court of Appeals, Eighth Circuit. March 4, 1907)

SANBORN, Circuit Judge. The J. T. Royston Milling Company, a corporation, was adjudged a bankrupt upon a petition filed on January 6, 1905. Prior to September 6, 1904, the Great Western Manufacturing Company, a corporation, had sold, installed, and put in operation in the Royston Company's mill at Fremont, in the state of Nebraska, certain machinery and material, for which at the time of their final acceptance it gave its promissory notes for $10,034.60 and an agreement that the title and the right to the possession of the machinery and material should remain in the vendor until the notes were paid, notwithstanding any agreement or security that was or might be taken for the performance of the agreement, and that the payment of the notes should be secured by a mortgage on the mill and its appurtenances, or equivalent security, at the election of the Great Western Company. This agreement was first filed in the proper county clerk's office on October 8, 1904. On October 10, 1904, the vendee made a mortgage on the mill and its appurtenances which was recorded in the office of the register of deeds of the proper county on the same day. The mill and its appurtenances, including the machinery and material sold by the Great Western Manufacturing Company, were sold by order of the court below for $16,400. The Great Western Company immediately thereafter filed its claim, and asked that it be paid in full out of the proceeds of the sale in preference to the claims of other creditors. The referee allowed the claim for $10,532.50, and denied it any preference. The District Court reversed this order, held that the agreement was valid and the mortgage a voidable preference, and directed that the vendor should be paid in preference to the other creditors such a proportion of the $16,400 as the value of the machinery and material it sold bore to the value of the mill and appurtenances at the time of the sale of the latter. It now presents its petition to revise this order because the court below did not uphold the mortgage and sustain its claim for a preference thereunder for the entire amount of the bankrupt's debt to it. The trustee moves to dismiss the petition because it was filed more than 10 days after the order assailed was made, and because it involves disputed questions of fact which it is alleged

can only be determined by appeal, and the trustee prays that if the merits of the case are considered the petitioner be denied any preference whatever.

While it is true that counsel do not agree upon the facts, the record fairly establishes those which have been stated, and upon them the case will be determined. The agreement of conditional sale whereby the vendor retained the title to the machinery and material until its purchase price was paid did not create a preference voidable under the bankruptcy law because it was given for a present consideration, for the machinery and material which were and continued to be the property of the vendor, and because it was made more than four months before the petition in bankruptcy was filed. Agreements of this nature which are not filed or recorded in the proper public office are voidable by purchasers, attaching creditors, and judgment creditors only, under the statutes of Nebraska (Comp. St. 1901, Neb. c. 32, § 26; Campbell Printing, etc., Co. v. Dyer, 46 Neb. 830, 836, 65 N. W. 904; McCormick Harvesting Machine Co. v. Callen, 48 Neb. 849, 67 N. W. 863), and there was none of either class when the petition in bankruptcy was filed in this case. The contract was therefore valid and enforceable against the bankrupt and against his ordinary creditors, and hence against the trustee, for he had no better right or title to the property than they, and he suffered no prejudice from the order of the court. Hewit v. Berlin Machine Works, 194 U. S. 296, 297, 303, 24 Sup. Ct. 690, 48 L. ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. ed. 782.

The Great Western Company insists, however, that it was entitled to payment of the entire amount of its claim out of the proceeds of the trustee's sale of the mill and machinery, because the proportion of those proceeds which the value of the machinery and material bore to the value of the mill and its appurtenances was but one-third, and under the order of the court it will sustain a heavy loss, and because it had a mortgage upon the entire property given in execution of an agreement made more than four months before the petition in bankruptcy was filed. The vendor had the right to take the machinery and material out of the mill and dispose of it as it saw fit. If it had applied to the court to do so and its application had been denied, it would have been entitled to recover of the trustee the value of its right. But it presented no such claim and made no applica-

tion of that nature. The proceedings in bankruptcy were pending from January 6, 1905, until May 25, 1905, before the sale was made. It was ordered on May 12, 1905, and the first act of the Great Western Company was the filing of a claim for a preference in payment out of the proceeds after the sale had been made. Its acquiescence in the sale of its property in the mill with that of the bankrupt estopped it from receiving out of the proceeds of the sale of the entire lot any larger proportion than the value of its property bore to the value of the entire property sold.

The mortgage was executed and recorded on October 10, 1904, within the four months prior to the filing of the petition in bankruptcy. The mortgagor was then hopelessly insolvent. The effect of the enforcement of the mortgage will be to enable the mortgagee to obtain a greater percentage of its debt than any of the bankrupt's other creditors of the same class can obtain, and the referee and the court were of the opinion, in which we concur, that the mortgagee had reasonable cause to believe when the mortgage was made that it was intended to give a preference thereby. But counsel persuasively argue that this mortgage escapes the ban of § 60 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), because it was made in the performance of the provision of the agreement of conditional sale that the notes of the vendee should "be secured by first mortgage on said premises and appurtenances (the mill site and mill), or equivalent security, at the first party's (the vendor's) election," and the question arises, is a mortgage or other transfer of an insolvent's property within the four months which is otherwise voidable as a preference protected by an agreement to make it executed prior to the four months? The statutes regarding the filing and recording of mortgages and transfers do not condition this issue in the case before us, and their effect will not be farther noticed, because the statutes of Nebraska do not avoid mortgages as against the mortgagors and their ordinary creditors for failure to file or record them. They make them voidable against attaching and judgment creditors only. Comp. St. Neb. 1901, c. 32, § 14; Forrester v. Bank, 49 Neb. 655, 68 N. W. 1059; Lancaster County Bank v. Gillilan, 49 Neb. 165, 68 N. W. 352.

Argument by analogy in support of an affirmative answer to the question here at issue may well be drawn from In re J. F. Grandy & Son (D. C.) 146 Fed. 318, Wilder v. Watts (D. C.) 138 Fed. 426, McDonald v. Daskam, 53 C. C. A. 554, 116 Fed.

276, and In re Wittenberg Veneer & Panel Co. (D. C.) 108 Fed. 593, 595, in which assignments of policies of insurance within the four months pursuant to agreements to make them, executed prior to the four months, were sustained under peculiar circumstances and from Sabin v. Camp (C. C.) 98 Fed. 974, in which a conveyance within the four months upon a payment of the balance of the purchase price was sustained where it had been made in performance of a contract executed prior to the four months to the effect that the creditor should advance money to purchase the property, should have a lien upon it, and the option, which he exercised, to buy it at a specified price for the amount of the money he had advanced and the cash balance requisite to aggregate the required amount.

But the theory and purpose of the bankruptcy act were to distribute the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors of the same class. To this end every judgment procured or suffered against him, every transfer by an insolvent of any of his property, every conceivable way of depleting it after the commencement of the four months the effect of which is "to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class," is declared to be a voidable preference if the creditor has reason to believe that a preference is intended thereby. Act July 1, 1898, c. 541, and Act, Feb. 5, 1903, c. 487, 30 Stat. 562, 32 Stat. 799 [U. S. Comp. St. 1901, p. 3445; U. S. Comp. St. Supp. 1905, p. 689]; Swarts v. Fourth National Bank, 54 C. C. A. 387, 389, 117 Fed. 1, 3. An agreement to mortgage or to transfer is not a mortgage or a transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors *pro rata*. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its

value may be preserved for the general creditors, and the mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him. Any other course of decision opens a new and enticing way to secure preferences, nullifies every provision of the law to prevent them, and invites fraud and perjury. Hold that transfers within four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankruptcy were filed they would perform their agreements. Dishonest men who made no such contracts might falsely testify that they had done so and thus by fraud and perjury sustain preferential transfers and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a fair and equal distribution of the property of debtors among their creditors would fail to accomplish one of its chief objects. This court will hesitate long before it approves a rule so fatal to the most salutary provisions of the bankruptcy law, and our conclusion is:

A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition. Wilson v. Nelson, 183 U. S. 191, 198, 22 Sup. Ct. 74, 46 L. ed. 147; In re Sheridan (D. C.) 98 Fed. 406; In re Dismal Swamp Co. (D. C.) 135 Fed. 415, 417, 418; In re Ronk (D. C.) 111 Fed. 154; Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555; Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C.) 125 Fed. 974; Johnston v. Huff, Andrews & Moyler Co., 133 Fed. 704, 66 C. C. A. 534; In re Mandel (D. C.) 127 Fed. 863.[37] In Wilson v. Nelson, 183 U. S. 191, 198, 22 Sup. Ct. 74, 46 L. ed. 147, the debtor had given an irrevocable power of attorney to the creditor to confess judgment many years before. Judgment was confessed under it within the four months, and the Supreme Court

37—Citizens' Trust Co. v. Tilt, 200 Fed. 410, *acc.*

held it to be a voidable preference. In re Sheridan (D. C.) 98 Fed. 406, In re Ronk (D. C.) 111 Fed. 154, and In re Dismal Swamp Co. (D. C.) 135 Fed. 415, 417, 418, mortgages executed within the four months in performance of agreements to give them made more than four months before the filing of the petitions in bankruptcy were held to be voidable preferences, and this view seems to be sustained by the terms of the bankruptcy act, by the more cogent reasons, and by the weight of authority. There was therefore no error in the decision below that the mortgage constituted a voidable preference, and that the limit of the vendor's preferential right was to receive the proportion of the proceeds of the sale justly attributable to the machinery and the material the ownership of which it retained.[38]

* * *

RICHARDSON v. SHAW

209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. 512

(United States Supreme Court. April 6, 1908)

Mr. Justice DAY delivered the opinion of the court:

This case comes here upon a writ of *certiorari* to the United States Circuit Court of Appeals for the second circuit. The petitioner, Richardson, brought suit in the District Court of the United States for the southern district of New York, as trustee in bankruptcy of J. Francis Brown, against John M. Shaw and Alexander Davidson, respondents, to recover certain alleged preferences.

Brown, the bankrupt, was a stockbroker transacting business in Boston. The respondents, John M. Shaw and Alexander Davidson, were partners and stockbrokers, transacting business in New York as John M. Shaw & Company, and, as customers of Brown, they transacted business with him on speculative account for the purchase and sale of stocks on margin. The account was carried on in Brown's books in the name of "Royal B. Young, Attorney," as agent of Shaw & Company.

The transactions between Brown and Shaw & Company were carried on for several months, from February to June, 1903. A debit and credit account was opened February 10, when Shaw & Company deposited with Brown $500 as margin, which was

38—See Tomlinson v. Bank of Lexington, 145 Fed. 824.

credited to them on the account, and Brown purchased for them certain securities at a cost of $3,987.50, which was charged to them on the account.

By agreement between the parties it was understood and agreed that all securities carried on the account or deposited to secure the same might be carried in Brown's general loans and might be sold or bought at public or private sale, without notice, if Brown deemed such sale or purchase necessary for his protection. On the accounts rendered by Brown the following memorandum was printed: "It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection."

Until the account was closed, on June 26, 1903, Shaw & Company from time to time paid to Brown various other sums of money as margins, which were credited to them. They also transferred to him various securities as margins in place of cash. They were charged with interest upon the gross amount of the purchase price, and credited with interest upon the margins they had deposited with Brown. If at any time the total amount of margins in securities or money exceeded 10 per cent, they had the right to withdraw the excess. Brown was at no time left with a margin less than 10 per cent. Shaw & Company kept a "liberal margin," at times rising to 23½ per cent.

According to the agreement the securities carried in this account or deposited to secure the same might be carried in Brown's general loans, and such securities were so pledged by him, and Young, as agent of Shaw & Company, was informed of the fact. The stocks were figured at the market price every day and statements rendered to Young.

The bankrupt, Brown, transacted much of his general business with Brown, Riley & Company, of Boston. He pledged his general securities with that company.

On June 24, 1903, Young, the agent of Shaw & Company, as above stated, learned of Brown's precarious financial condition, and demanded payment of $5,000 cash from Brown's agent, Fletcher. At that time the margins already paid by Shaw & Company exceeded the agreed 10 per cent, and Fletcher returned to them $5,000 of such margin.

On the following day, June 25, Young demanded a final settlement from Brown. At that time Brown was insolvent within

the meaning of the bankrupt law, and had been for the two preceding months. On June 26 the liquidation of this account was effected as follows: Brown, the bankrupt, indorsed to Brown, Riley & Company, a note of $5,000, made by one of his debtors, and gave them a check for $1,200, thereby increasing his margin on the general loan, and agreed that $10,664.13 should be charged against his margin and credited to Shaw & Company, and a check was given by them, through the Beacon Trust Company, to the order of Brown, Riley & Company, for $34,919.62, and the securities to the value of $45,583.75 were turned over to them. None of the certificates of stock which Brown delivered to Shaw & Company were the identical certificates which they had delivered to Brown as margain. Two certain bonds, known as the "Shannon bonds," had been deposited with Brown.

Among the creditors (customers) of Brown on the final day of settlement there were a number of general customers upon transactions in purchase and sale of stocks by Brown as broker, similar to the transactions in the purchase and sale of stocks by Brown as broker for Shaw & Company.

On July 27, 1903, Brown made an assignment, and was adjudicated a bankrupt within four months, and petitioner in this case, Henry Arnold Richardson, was elected trustee.

It was conceded by plaintiff's counsel that it was the custom of the market to deliver shares from broker to customer of the same amount without regard to whether they were the identical shares received.

This suit was brought to recover the $5,000 paid to Shaw & Company June 24, 1903, which sum, it is alleged, was paid to them as excessive margins, and, it is alleged, enabled them to obtain a preference as one of the creditors of Brown. The second cause of action in the suit states that Shaw & Company are indebted to Brown's estate in the sum of $10,664.13, being the amount he transferred for their benefit, as above set forth.

At the close of the plaintiff's case he requested to go to the jury upon the issue of defendant's knowledge of Brown's insolvency. The court held that no preference was shown, and directed a verdict for defendants. The judgment was affirmed. 77 C. C. A. 643, 147 Fed. 659, 665.

The ground on which the counsel for the petitioner predicates the alleged preferences in this case is that when the stockbroker Brown was approached for the settlement of the transaction with Shaw & Company, being insolvent and dealing with several cus-

tomers, as to each of whom he had pledged the stocks carried for them, and, under the understanding of the parties, being under obligation to each of them to redeem the stocks from the loan for which they were pledged, this obligation created a right of demanding the pledged stocks and securities on the part of each of the customers, which put the broker in the debtor class and the customers into the creditor class, so that, if the broker used his assets to carry out such obligation to a particular customer, whereby the latter was able to redeem his stock from such pledge upon payment only of the amount of his indebtedness to the broker, with the result that the broker could not carry out similar obligations to other customers in like situation, a preference is created under § 60 of the bankrupt act, and this, says the learned counsel in his brief, under any theory concerning the relation of broker and customer, is "the main proposition upon which we hang our appeal."

This case, therefore, requires an examination of the relations of customer and broker under the circumstances disclosed in this record; at least, so far as it is necessary to determine the question of preference in bankruptcy upon which the case turns.

* * *

The rule thus established by the courts of the state where such transactions are the most numerous, and which has long been adopted and generally followed as a settled rule of law, should not be lightly disturbed, and an examination of the cases and the principles upon which they rest lead us to the conclusion that in no just sense can the broker be held to be the owner of the shares of stock which he purchases and carries for his customer. While we recognize that the courts of Massachusetts have reached a different conclusion, and hold that the broker is the owner, carrying the shares upon a conditional contract of sale, and, while entertaining the greatest respect for the supreme judicial court of that state, we cannot accept its conclusion as to the relation of broker and customer under the circumstances developed in this case. We say this, recognizing the difficulties which can be pointed out in the application of either rule.

At the inception of the contract it is the customer who wishes to purchase stocks, and he procures the broker to buy on his account. As was said by Mr. Justice Bradley, speaking for the court in Galigher v. Jones, 129 U. S. 193-198, 32 L. ed. 658, 659, 9 Supt. Ct. Rep. 335, a broker is but an agent, and is bound to

follow the directions of his principal, or give notice that he declines the agency.

The dividends on the securities belong to the customer. The customer pays interest upon the purchase price, and is credited with interest upon the margins deposited. He has the right at any time to withdraw his excess over 10 per cent deposited as margin with the broker. Upon settlement of the account he receives the securities. In this case the broker assumed to pledge the stocks, not because he was the owner thereof, but because, by the terms of the contract, printed upon every statement of account, he obtained the right from the customer to pledge the securities upon general loans, and in like manner he secured the privilege of selling when necessary for his protection.

The risk of the venture is entirely upon the customer. He profits if it succeeds; he loses if it fails. The broker gets out of the transaction, when closed in accordance with the understanding of the parties, his commission and interest upon the advances, and nothing else. That such was the arrangement between the parties is shown in the testimony of the broker's agent, who testified: "If these stocks carried for J. M. Shaw & Company made a profit, that profit belongs to Shaw & Company over and above what he owed us."

When Young, the agent of Shaw & Company, demanded the stocks, their right of ownership in them was recognized, and, while pledged, they were under the control of the broker, were promptly redeemed, and turned over to the customer. Consistently with the terms of the contract, as understood by both parties, the broker could not have declined to thus redeem and turn over the stock, and, when adjudicated a bankrupt, his trustee had no better rights, in the absence of fraud or preferential transfer, than the bankrupt himself. Security Warehousing Co. v. Hand, 206 U. S. 415, 423, 51 L. ed. 1117, 1122, 27 Sup. Ct. Rep. 720; Thompson v. Fairbanks, 196 U. S. 516, 526, 49 L. ed. 577, 586, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481.

It is objected to this view of the relation of customer and broker that the broker was not obliged to return the very stocks pledged, but might substitute other certificates for those received by him, and that this is inconsistent with ownership on the part of the customer, and shows a proprietary interest of the broker

in the shares; but this contention loses sight of the fact that the certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named.

A certificate of the same number of shares, although printed upon different paper and bearing a different number, represents precisely the same kind and value of property as does another certificate for a like number of shares of stock in the same corporation. It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer. Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Taussig v. Hart, 58 N. Y. 425; Skiff v. Stoddard, 63 Conn. 198, 218, 21 L. R. A. 102, 26 Atl. 874, 28 Atl. 104. As was said by the Court of Appeals of New York in Caswell v. Putnam, 120 N. Y. 153, 157, 24 N. E. 287, "one share of stock is not different in kind or value from every other share of the same issue and company. They are unlike distinct articles of personal property which differ in kind and value, such as a horse, wagon, or harness. The stock has no earmark which distinguishes one share from another, so as to give it any additional value or importance; like grain of a uniform quality, one bushel is of the same kind and value as another."

Nor is the right to repledge inconsistent with ownership of the stock in the customer. Skiff v. Stoddard, 63 Conn. 216, 219, 21 L. R. A. 102, 26 Atl. 874, 28 Atl. 104; Ogden v. Lathrop, 65 N. Y. 158. It was obtained in the present case by a contract specifically made, and did not affect the right of the customer, upon settlement of the accounts, to require of the broker the redemption of the shares and their return in kind.

It is true that the right to sell, for the broker's protection, which was not exercised in this case, presents more difficulty, and is one of the incongruities in the recognition of ownership in the customer; nevertheless it does not change the essential relations of the parties, and certainly does not convert the broker into what he never intended to be and for which he assumes no risk, and takes no responsibility in the purchase and carrying of shares of stock.

The broker cannot be converted into an owner without a per-

version of the understanding of the parties, as was pertinently observed in the very able discussion already referred to in Skiff v. Stoddard, 63 Conn. 216, 21 L. R. A. 111, 26 Atl. 879: "So long as the interpretation of the contract preserves as its distinctive feature the principal proposition that the customer purchases merely the right to have delivery to him in the future, at his option, of stocks or securities at the price of the day of the agreement, and its corollary that the customer derives no right, title, or interest in the stocks or securities until final performance, the difficulties in the way of harmonizing the situation are bound to exist. The fundamental difficulty grows out of the necessary attempt in some way to transform the customer, who enjoys all the incidents and assumes all the risks of ownership, into a person who in fact has no right, title, or interest, and to create out of the broker, who enjoys none of the incidents of ownership, and assumes not a particle of its responsibility, a person clothed with a full title and an absolute ownership."

We reach the conclusion, therefore, that, although the broker may not be strictly a pledgee, as understood at common law, he is essentially a pledgee, and not the owner of the stock, and turning it over upon demand to the customer does not create the rélation of a preferred creditor, within the meaning of the bankrupt law.

We cannot consent to the contention of the learned counsel for the petitioner, that the insolvency of the broker at once converts every customer having the right to demand pledged stocks, into a creditor who becomes a preferred creditor when the contract with him is kept and the stocks are redeemed and turned over to him.

In the absence of fraud or preferential transfer to a creditor the broker had a right to continue to use his estate for the redemption of the pledged stocks. As this court said in Cook v. Tullis, 18 Wall. 332-340, 21 L. ed. 933-937:

"There is nothing in the bankruptcy act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to defraud or delay his creditors or give preference to anyone, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste

his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously."

The bankrupt act, in § 60*a*, provides: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

A creditor is defined to include anyone who owns a demand or claim provable in bankruptcy. § 1, sub. 9, Bankruptcy Act 1898 (30 Stat. at L. 544, c. 541, U. S. Comp. Stat. 1901, p. 3419). It is essential, therefore, in order to set aside the alleged preference, that Shaw & Company, at the time of the transfer, should have stood in the relation of creditor to the bankrupt. Of course, if the New York rule based upon Markham v. Jaudon is correct, and the broker was the pledgee of the customer's stock, there can be no question that, in redeeming these stocks for the purpose of satisfying the pledge, no preferential transfer under the bankruptcy act resulted.

In our view we think no different result is reached, so far as a preference in bankruptcy is concerned, if the Massachusetts cases could be taken to lay down the correct rule of the relations between broker and customer.

That rule is said to have its origin in Wood v. Hayes, 15 Gray, 375, decided in 1860, in which the opinion, though by Chief Justice Shaw, is very brief. It was therein held that the broker was a holder of the shares upon conditional contract to deliver them to the customer upon the payment of so much money, and until the money was paid the right to have performance did not accrue.

In Covell v. Loud, 135 Mass. 41, 46 Am. Rep. 446, the right of the broker was considered after the customer had refused to pay the necessary margin, and after the customer had requested the broker to do the best he could for him and to sell the stock at the broker's board without notice, and it was held that under such circumstances the broker was not liable for conversion.

In Weston v. Jordan, 168 Mass. 401, 47 N. E. 133, the question was as to the relation between customer and broker after the

broker had parted with the shares after repeated demands by the customer and refusal by the broker to deliver the shares, and it was held that a valid cause of action arose in favor of the customer, whether for breach of contract, or for conversion, it matters not.

In Chase v. Boston, 180 Mass. 459, 62 N. E. 1059, the opinion is by Chief Justice Holmes, and the question directly decided is whether a broker who held shares of stock in his own name, and which he carried for his customer on margin, was required to pay a city tax upon the value. It was held that he was. In that case the learned justice said:

"No doubt, whichever view be taken, there will be anomalies, and no doubt it is possible to read into either a sufficient number of implied understandings to make it consistent with itself. Purchases on margin certainly retain some of the characteristics of ordinary single purchases by an agent, out of which they grew. The broker buys and is expected to buy stock from third persons to the amount of the order. Rothschild v. Brookman, 5 Bligh, N. R. 165, 2 Dow & C. 188; Taussig v. Hart, 58 N. Y. 425. He charges his customer a commission. He credits him with dividends and charges him with assessments on stock. However the transaction is closed, the profit or loss is the customer's. But none of these features is decisive."

And while the rule dating back to the decision of Chief Justice Shaw in 15 Gray was recognized as the law of Massachusetts, there is nothing in the case decisive of the question now before us.

The case most relied upon as showing the preference is Weston v. Jordan, *supra*. It was held in that case that Wheatland, the broker (Weston was his assignee in insolvency) had become a debtor to the customer Jordan, having parted with the control of the shares and substituting none others for them after repeated demands for them by the customer. And it was held that when the insolvent broker went into the street and bought that kind of stocks with his own money, and the customer took the stocks, knowing of such purchase, the transaction amounted to a preference; and in course of the discussion Mr. Justice Alllen, referring to the contention of counsel that the Massachusetts rule should be reconsidered in view of the rules adopted in New York and other states, said:

"The defendant seeks to have these decisions reconsidered; but the facts of the present case do not call for such reconsideration of the general doctrine. Even if at the outset Jordan

were to be deemed a pledgor, and Wheatland a pledgee, of the shares, that relation was changed by what happened afterwards. * * * After Wheatland had parted with the control of the shares, and *after repeated demands for them by Jordan, and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland, either for breach of contract or for a conversion; it matters not which.*"

The facts in the present case are entirely different from those disclosed in the case just cited. In the present case there was no demand for the return of the stocks which was refused by the broker; but, recognizing the obligation of the contract, when the stocks were demanded the broker proceeded to redeem them from the pledge which he had made of them under the right given by the contract between the parties, and turned them over to the customer. In such case the relation of debtor and creditor did not arise as it might upon the refusal, as in Weston v. Jordan, to turn over the stocks upon demand.

After an examination of the Massachusetts cases, Judge Lowell held In re Swift, 105 Fed. 493, while following the Massachusetts rule as between broker and customer, that no cause of action arose until after demand by the customer. And the same view was taken in the same case upon review in the Court of Appeals for the first circuit in an opinion by Judge Putnam, 50 C. C. A. 264, 112 Fed. 315. While both courts held that under the law, as defined in the Massachusetts cases, bankruptcy excused demand, they held that the customer did not become a creditor upon insolvency, but only after demand and refusal or its equivalent.

How then stood the parties at the time of the demand for the return of these shares of stock? They were held upon a contract, which required the broker, upon demand, to turn over the shares purchased, or similar shares, to the customer upon payment of advancements, interest, and commissions. These stocks were redeemed and turned over to him; as a consequence the relation of debtor and creditor as between the broker and customer did not arise.

Upon the principles heretofore discussed, we think the payment of the $5,000, on June 24, was not a preferential payment to a creditor. The customer had demanded settlement, the broker had paid the $5,000, and on the following day this sum was taken into account in settling the account before turning over

to the customer the stock belonging to him, according to the understanding of the parties.

We find no error in the judgment of the Court of Appeals, and the same is affirmed.[39]

Mr. Justice HOLMES:

If I had been left to decide this case alone I should have adhered to the opinion which, upon authority and conviction, I helped to enforce in another place. I have submitted a memorandum of the reasons that prevailed in my mind to my brethren, and, as it has not convinced them, I presume that I am wrong. I suppose that it is possible to say that, after a purchase of stock is announced to a customer, he becomes an equitable tenant in common of all the stock of that kind in the broker's hands; that the broker's powers of disposition, extensive as they are, are subject to the duty to keep stock enough on hand to satisfy his customers' claims; and that the nature of the stock identifies the fund as fully as a grain elevator identifies the grain for which receipts are out. It would seem to follow that the customer would have a right to demand his stock of the trustee himself, as well as to receive it from the bankrupt, on paying whatever remained to be paid. A just deference to the views of my brethren prevents my dissenting from the conclusion reached, although I cannot but feel a lingering doubt.

CLARKE v. ROGERS

228 U. S. 534, 57 L. ed. 953, 33 Sup. Ct. 587

(United States Supreme Court. May 5, 1913)

Mr. Justice McKENNA delivered the opinion of the court:

Petition by appellee as trustee in bankruptcy of the estate of John O. Shaw to recover a preference.

The facts are these: The bankrupt, John O. Shaw, was, for a long time prior to the adjudication in bankruptcy, trustee under the will of Samuel Parsons, late of Newton, in the county of Middlesex, Massachusetts, of two trusts; one for the benefit of Charles A., James H., and Henry B. Parsons, and the other for the benefit of E. F. and E. A. Parsons.

39—See Sexton v. Kessler, 225 U. S. 90; Gorman v. Littlefield, 229 U. S. 19; Nat. City Bank v. Hotchkiss, 231 U. S. 50; In re Hollins & Co., 212 Fed. 317; Sharp v. Simonitsch, 107 Minn. 133.

After proceedings in bankruptcy had been commenced, Shaw resigned the trusts, and his resignation was accepted by the Probate Court of Middlesex county on the 25th of March, 1908, and appellant, George Lemist Clarke, was appointed trustee of the trusts and duly qualified.

In the month of January, 1908, and within four months before the filing of the petition in bankruptcy against him, and whilst he was insolvent, Shaw was largely indebted to each of the trusts and to himself as trustee, and transferred from himself individually to the trusts and to himself as trustee thereof as follows: To the trust for C. A. Parsons et al., seven of the $1,000 collateral trust 4 per cent bonds of the American Telephone & Telegraph Company (numbers specified) and two $1,000 Chicago, Burlington & Quincy Railroad Company 3½ per cent Illinois Division (numbers specified): to the trust of E. F. and E. A. Parsons, twelve $1,000 Northern Pacific-Great Northern 4 per cent joint bonds, Chicago, Burlington & Quincy collateral.

The transfers were made by Shaw with knowledge of his insolvency, and with intent to prefer the trusts and himself as trustee, and the effect (it is alleged) of such preference, if not avoided, will be to enable the trust estates and himself as trustee thereof (being one of his individual creditors) to obtain a greater percentage of his debts than any other of his creditors of the same class.

The petition prayed that the bonds be declared to be the bonds of petitioner, appellee here, and that Clarke, appellant here, be ordered to execute such instruments as might be necessary to transfer the title to and possession of all the bonds to petitioner.

The answer of appellant denied only that the transfers were made within four months of the bankruptcy, that Shaw was, at the time of the transfer, insolvent, that all the trusts were his creditors then or have become so since, within the meaning of the statute, and denies that he intended by the transfers to give a preference, or that they constitute a preference.

The decree of the district judge was that five of the seven Telephone and twelve of the Northern Pacific-Great Northern Railroad Company 4 per cent joint bonds, and all of the coupons thereon payable after January, 1908, were the property of the trustee in bankruptcy, appellee here.

It was further adjudged that the American Telephone & Telegraph Company collateral trust 4 per cent bonds (numbered 20,818 and 20,819) were in part the property of the appellant

as trustee and of appellee as trustee. The bonds were directed to be sold. The decree was affirmed by the Circuit Court of Appeals. [183 Fed. 518, 106 C. C. A. 64.]

The District Court found the facts. They are summarized in its opinion as follows:

"The bankrupt, being insolvent, and knowing himself to be insolvent, was discovered by the surety on his bond as trustee under the Parsons will, not to be in possession of some of the securities which formed a part of the trust estate, and which should have been in his possession as trustee. He was being urged by the surety to make good this shortage. For the purpose of doing so, he placed the bonds in question in a safe-deposit box, taken and agreed on by himself and the surety as a separate place of deposit for the securities belonging to this trust. In the box were placed also those securities belonging to the trust funds which had not gone out of his possession. All the securities thus placed in the box and held as constituting the trust funds have since remained there. The bankrupt has been removed as trustee, and the respondent, his successor in the trust, has at present the possession and control of the contents of the box, including the bonds in question.

"The bankrupt had at the time more than twenty-five other trust estates in his charge as trustee. There was, in the case of each, a shortage for which he was responsible, and he knew the fact to be so. The total amount of these shortages exceeded $350,000.

"It has not been shown that any of the bonds used as above to make good the shortage in the Parsons trust estate, or that any of the money wherewith the bankrupt purchased those bonds, can be identified as belonging to any one of the other trust estates in the bankrupt's charge. He drew out and used to purchase certain of the bonds a savings bank deposit of $1,500 belonging to one of the Parsons trust funds; but with that exception the money wherewith the bonds were bought as well as the bonds themselves must, for the purposes of the questions to be decided, be regarded as the bankrupt's individual property at the time he set them apart in the manner stated, to be thereafter held as trust property."

The question in the case is, Do these facts show a preference within the meaning of the Bankruptcy Law?

Putting to one side the identity of Shaw as an individual and Shaw as the trustee of the trusts, there are the elements of a

preference. In other words, there is indebtedness; Shaw is indebted to all of the estates of which he was trustee. He used his individual property to pay the indebtedness to the Parsons trust, and he thus gave that trust a preference over the others. It was enabled to the extent of the property transferred to obtain a greater percentage of its debts than the other trusts. What, then, stands in the way of setting the transfer aside? The debt was not a provable one in bankruptcy, it is contended, and on that contention the case is rested, and to it we may direct our considerations, and in that the provisions of the statute become necessary elements.

Section 60*a*, as amended, is as follows:

"A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

A creditor is defined to be "anyone who owns a demand or claim provable in bankruptcy [and] may include his duly authorized agent, attorney, or proxy."

Debt includes any debt, demand, or claim provable in bankruptcy. Transfer includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.

Appellant deduces from these definitions that no question of a preference can arise except when the transfer is made to the owner of a provable claim, or to his agent, and that no claim is provable except when enumerated in § 63*a*, and none other can be liquidated under paragraph b. Of the claims enumerated in § 63*a*, the fourth is the only one with which we are concerned. It is as follows: "(4) Founded on an open account, or upon a contract, express or implied." The final contention of appellant is that one, to receive a preference, must be a creditor of the bankrupt upon a contract, express or implied. It is not enough that there be some kind of legal or equitable claim against the bankrupt. These postulates laid down, he builds upon them an argument of great technicality to show that the trusts of Shaw were not his creditors, and therefore could not receive from him a preference. An obligation to the trusts is not denied, but it is

an obligation, it is asserted, which was represented entirely by his bond, and had no remedy but by a suit on the bond. The liability of Shaw, it is further contended, considered independently of the bond, was in the nature of a pure tort liability which could not be waived and the remedies of a contract availed of.

That some torts may be waived and be the bases of provable claims is decided in Crawford v. Burke, 195 U. S. 176, 187, 49 L. ed. 147, 151, 25 Sup. Ct. Rep. 9. Crawford and one Valentine were stockbrokers and dealers in investments. They had in their possession certain shares of stock which they held as a pledge and security for the amount due them by Burke on the stock. They sold Burke's reversionary interest in the stock, whereby it was wholly lost. He sued them in trover. They set up their discharge in bankruptcy. It was held, the court speaking through Mr. Justice Brown, to be clear that the debt of Burke was embraced within the provisions of paragraph a, as one "founded upon an open account, or upon contract, express or implied," and might have been proven had he chosen to waive the tort and take his place with other creditors of the estate. The discharge in bankruptcy was held on other provisions of the act to be a defense. The case was applied and followed in Tindle v. Birkett, 205 U. S. 183, 186, 51 L. ed. 762, 764, 27 Sup. Ct. Rep. 493, in an action to recover damages claimed to have been sustained by false and fraudulent representations. It was decided that the claim was one provable under § 63*a* as "founded upon an open account or upon a contract, express or implied." It is, however, said that these cases are explained and limited in Frederic L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332, to instances "where there is a claim arising out of a contract, but of such a nature that there is at the same time an independent remedy in tort." To make this distinction available, appellant must establish his contention that there was no contractual relation, either between Shaw and his trusts or the *cestuis que trust* of the trusts; in other words, that the sole liability was upon Shaw's bond. There is no other remedy, is the repeated insistence, and that only after a final accounting has been had in the Probate Court, showing a liquidated balance due from the accountant. Then, and not until then, as we understand appellant, a creditor emerges with a provable claim. Appellant, however, halts somewhat at the logic of his argument, and ventures to say that a

decision in his favor does not necessarily involve a decision that a claim upon the bond of the defaulting trustee could not be proved for a dividend in the name of the probate judge. But is not this concession in opposition to the relation asserted to exist between a provable debt and a transfer of property on account of it being a preference?

We have considered the contentions of appellant somewhat minutely, so as to fully present them. The lower courts, while giving attention to the technical elements of appellant's arguments, cut through them to apply the fundamental purpose of the Bankruptcy Law; that is, equality between creditors. The District Court, following Bush v. Moore, 133 Mass. 198, decided in 1882 under a provision of the Massachusetts insolvency law which was similar to the provision in the Bankruptcy Act of the United States, found no difficulty in the same person, considered in different capacities, acting as giver and receiver of a fraudulent preference. The Court of Appeals met the contention of appellant that there must be a contractual relation, and decided that it existed, both on account of the bond and independently of the bond. The court said: "It is true that, in the ordinary course, enforcing the bond would be at the end of the proceedings, and not at the beginning. Notwithstanding, as the equitable rules which govern bankrupts always look to the end, and disregard the intervening details as only steps to reach the end, there was in this case a contract from the beginning,—that is, the bond,—which was capable of liquidation on the rules explained in Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493. * * * Aside from this and independently of the bond, we believe there is an obligation resting on a defaulting testamentary trustee to restore the value of the assets embezzled, which is of contractual character."

But this, appellant contends, is to evolve "two moral persons out of one embezzler." The criticism only can be made by putting out of view what the "one embezzler" represents. He is one being, but acts in more than one capacity, and in all of his capacities he has duties and obligations. The relation of a trustee to the trust property is not the same as his relation to his individual property. He certainly may incur obligations to the trust. He can only satisfy the obligations out of his individual property, and by doing so may deplete it, make it deficient, to satisfy its obligations. These are realities, not fictions. We must overlook essential things to disregard them, and hence the de-

cision in Bush v. Moore, *supra*. Moore was the guardian of his son, and wrongfully appropriated to his own use the moneys of his ward. Within six months preceding his insolvency, and being insolvent, intending to restore the funds he had appropriated, he deposited in the defendant bank the necessary sum derived from his private property. His assignees in insolvency sued in equity to recover the sum as a preference, alleging that he at the time was insolvent, and acted in contemplation of insolvency. The Massachusetts statute made void any payment or conveyance of property by an insolvent "to any creditor or person having a claim against him" and gave power to the assignee to recover the property.

These contentions were made: (1) The ward was not a creditor of the guardian or a person having a claim against him. (2) The act of the guardian did not constitute a preference which was avoidable by reason of his insolvency. (3) Had the misappropriation continued, there would have been no claim by the ward which could have been the foundation of a suit. (4) His remedy was to summons the guardian into the Probate Court, and then, upon adjudication there, or if he failed to account, there would have been only the remedy for failure to account or to comply with the decree of the court.

The contentions, it will be observed, were like those made in the case at bar. They were all rejected. It was held that the title to the property continued in the ward, the guardian having its custody only, and, he having wrongfully used it, there was a just claim on the part of the ward that the integrity of the fund should be restored. The court said: "The title to the property of one under guardianship continues always in the ward; the guardian has its custody merely. If, availing himself of that custody, he wrongfully uses it, there is a just claim on the part of the ward that the integrity of the fund shall be restored. It is not important in what form the ward is compelled to seek his remedy, or that the wrongful act of the guardian will not immediately afford a ground of action against him. Even if, upon a settlement in the Probate Court, it might have been held that the lawful and proper charges of the guardian would exceed the amount of his spoliations, there was not the less a just claim that the ward's property which had been unlawfully dealt with should be replaced."

To the contention that two persons were necessary to consummate a preference, one to transfer and the other to receive the

property, the court answered: "But where the same person acts as the giver and receiver of the security, the concurrence and participation of two parties to the fraudulent preference exists. * * * One individual acting in two capacities, as debtor and on behalf of the creditor, may constitute the two persons contemplated by the statute." And, supplying the element of knowledge of the insolvency and the preference required by the statute, the court said that the ward was bound by the knowledge of his guardian.

The case is certainly determinative of appellant's contention that accounting in the Probate Court was necessary as a condition to a provable claim, or that a suit on a bond was the only remedy available for the misappropriation of the funds by a guardian. This applies as well to a trustee; and that there may be a contractual obligation of one trust to another under the laws of Massachusetts is decided in Bremer v. Williams, 210 Mass. 256, 96 N. E. 687. In that case a person who was the sole trustee of two separate estates paid the taxes due from one of them with money embezzled from the other. It was held that the new trustee of the latter could maintain suit in equity to recover from another unjustly enriched by the embezzlement. The liability of the latter to the former, the court said, grew out of an implied or constructive obligation, and did not rest upon an express trust; and, being such, the statute of limitations would be a bar in equity as well as in law. In other words, the court recognized that from the misuse of the funds the law would imply an obligation to repay. This ruling brings the case at bar within Crawford v. Burke and Tindle v. Birkett, even if their application be as limited as appellant contends. It may be questioned if they are so limited. They recognize the relation of § 63*a* to § 17. § 17 excludes certain debts from discharge; among others, those created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." It was said in Crawford v. Burke: "If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of the discharge?" The question was pertinent in view of the language of the section. It provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as," etc. The relation of the section was also recognized in Friend v. Talcott, 228 U. S. 27, 57 L. ed. 718, 33 Sup. Ct. Rep. 505. It is there declared that § 17 enumerates the

debts *provable* under § 63*a* which are not discharged. Among them, we have seen, are those created by fraud, embezzlement, misappropriation, or defalcation in any fiduciary capacity. It would seem, therefore, to follow that the conversion of trust funds creates a liability provable in bankruptcy.

The Court of Appeals expressed the hardship of a contrary conclusion. "Moreover," the court said, "it will be a great hardship if the various estates of which Shaw was trustee cannot recover any part of their loss of about $350,000 by sharing in his bankrupt estate. This might, of course, in this instance, be but a very small dividend; but in another instance it might be very near the face of the default. Any construction which would leave such a result as that cannot, of course, be accepted unless fairly forced upon us." [106 C. C. A. 69, 183 Fed. 523.]

In this, we think, the court was right. Equality between creditors is necessarily the ultimate aim of the Bankrupt Law, and to obtain it we must regard the essential nature of transactions, not their forms or accidents. As we have said, there may be an unity of the person in the individual and the trustee, of the individual and the guardian; we must look beyond it to the difference in his capacities and the duties and obligations resulting from it. These duties and obligations are as distinct and insistent as though exercised by different individuals, and have the same legal consequences. The unity of the person has, of course, an effect. It constitutes such relationship between the different capacities exercised as to impute knowledge of their exercise and for what purpose exercised. Bush v. Moore, 133 Mass. 198; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 282, 9 Am. St. Rep. 698, 17 N. E. 496; Rogers v. Palmer, 102 U. S. 263, 26 L. ed. 164; Atlantic Bank v. Merchants' Bank, 10 Gray, 532, cited in United States v. State Nat. Bank, 96 U. S. 30, 36, 24 L. ed. 647, 648.

Decree affirmed.

Mr. Justice HOLMES concurs in the result.

IN RE BANKS

207 Fed. 662

(District Court, N. D. New York. September 15, 1913)

RAY, D. J. The referee has allowed the claim of John Quencer at the sum of $792.03 and the claim of Philip Quencer at the sum of $701.26. The allowance of these claims is chal-

lenged on the ground that they were barred by the six years' statute of limitations at the time the petition in bankruptcy was filed, and that the bar of the statute had not been removed by part payment or by an acknowledgment of the debt in writing, as provided by § 395 of the Code of Civil Procedure of the state of New York, which provides that:

"An acknowledgment or promise contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest."

On the 7th day of September, 1912, the bankrupt, Ira O. Banks, signed and verified his petition and schedules in voluntary bankruptcy, which were filed September 12, 1912, and adjudication made. In the schedules of debts owing the bankrupt listed, "Philip Quencer, Watertown, N. Y., note, $250," and "John Quencer, Perch River, N. Y., note, $250," and no mention was made therein of any other debt owing them or either of them or of the consideration for the note, if there was one. After the trustee was appointed and qualified, and September 25, 1912, Philip Quencer filed his verified claim for:

71 tons of hay at $9.50	$674.50
September, 1904, by cash	200.00
	$474.50
Interest for 8 years	227.76
	$702.26
1912. Received	1.00
Balance due	$701.26

October 14, 1912, John Quencer filed his claim with the referee for:

66 tons of hay at $11	$726.00
Interest to April 1, 1905	23.23
	$749.23
April 1, 1905, cash	200.00
	$549.23

Interest to September 1, 1912	244.40
	$793.68
September, 1912, cash	1.00
	$792.63

—with interest from September 1, 1912.

In the verified claims filed there is no mention of or reference to a note or notes. The claims state:

"That the consideration of said debt is as folllows: 'Goods, wares and merchandise sold and delivered to the said bankrupt at his special instance and request.' * * * Nor has any note or other evidence of said debt been received except as herein stated."

As stated no note is mentioned in the claim. The total of all claims of other creditors proved is $721.69.

As to the claim of Philip Quencer it is asserted that on the 10th or 11th of September, 1912, some five days after the petition was verified and one or two days before it was filed, Banks paid to Quencer the sum of $1 and stated to him that he wanted to pay him the dollar to renew the debt. As to the claim of John Quencer, it is asserted that on the 10th or 11th day of September, 1912, Banks paid to him the sum of $1 and stated that he paid it to him for the purpose of renewing the debt. What debt was not mentioned.

It is, of course, true that until a bankrupt files his petition in bankruptcy, he is the owner of all his property and may sell or incumber it, except in fraud of creditors or in violation of some provision of law, as he sees fit. Even after the petition is filed and down to the time of the adjudication, the title remains in the bankrupt, but during that time he holds in a sort of trust capacity for creditors.

A debtor as a general rule may at any time acknowledge a debt against which the statute of limitations has run and renew same by a promise in writing which identifies the debt or by a partial payment of the specific debt. A recognition of the debt by a part payment thereof operates as a new promise to pay the remainder. If, as against the trustee and the creditors, this renewal of the debt cannot be effected by an acknowledgment of the debt made in the schedules and filed with the petition, still if the acknowledgment in writing is made before the petition is filed or a part payment of the specific debt is made before the

filing of the petition, in the absence of fraud on the law or collusion, I see no reason why the transaction is not valid, unless made under such circumstances as to amount to a preference. If within four months of filing a petition the debtor makes a payment on an outlawed debt intending at the time to go into bankruptcy knowing his insolvency, and the person receiving the payment knows the insolvency and has reasonable cause to believe that a preference is intended, it would not be such a payment as would renew the debt. The transaction would be in fraud of the Bankruptcy Act. The transaction could be repudiated by the trustee and the payment recovered.

By § 60a of the Bankruptcy Act, as amended, it is provided that:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * * or made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

And § 60b provides that:

"If a bankrupt shall * * * have made a transfer of any of his property, and if, at the time of the transfer, * * * the bankrupt be insolvent and * * * the transfer then operates as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

§ 57g of the act provides that:

"The claims of creditors who have received preferences, voidable under § 60, subdivision b, * * * shall *not be allowed* unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

If, then, the payment to renew a debt be made on the eve of bankruptcy (that is, the filing of a petition) and be made under such circumstances and with such knowledge as to constitute the giving and receipt of a preference, the claim cannot be allowed unless the preference is surrendered. The amount of the payment is immaterial. If the payment is recovered (that is, was

in fraud of the law), then how can it operate to renew the debt? It leaves the whole matter as if no payment had been made.

It is plain that Banks knew his insolvency and intended to prefer both John and Philip Quencer. What knowledge did they have? So far as appears, these claimants had not taken any proceedings to collect or reduce their claims to judgment, except one of them says he had spoken of the debt, we may infer, when he met Banks. All deny that the claimants had any knowledge of the contemplated bankruptcy proceedings prior to the filing of the petition. All fail to remember anything that was said at the time the $1 payments were made, except the statement of Banks that he wanted to pay the $1 to renew the debt.

The alleged renewal of the debts by listing claims in the schedules, "creditors whose claims are unsecured, * * * Philip Quencer, Watertown, N. Y., note, $250; John Quencer, Perch River, N. Y., note, $250"—cannot be held to renew these claims on accounts two years outlawed when it appears that no note whatever was given. It appears in such case that the debtor had notes in mind, not an account for goods, wares, and merchandise sold and delivered. If he intended to renew a note, he certainly did not intend to renew an account for hay for which no note had been given.

"The general rule is that a new promise, whether made before or after the bar is complete, will avoid the operation of the statute of limitations." 25 Cyc. 1328; Winchell v. Hicks, 18 N. Y. 558; Esselstyn v. Weeks, 12 N. Y. 635; Wright v. Parmenter, 23 Misc. Rep. 629, 52 N. Y. Supp. 99.

See the many cases cited in note, 25 Cyc. 1328.

"The general rule is that an acknowledgment or promise to pay, in order to take the debt out of the statute, must satisfactorily and certainly appear to refer to the very debt in question." Stafford v. Bryan, 3 Wend. (N. Y.) 532; Clark v. Dutcher, 9 Cow. (N. Y.) 674; 25 Cyc. 1330, and cases there cited.

In re Currier (D. C.) 27 Am. Bankr. Rep. 597, 601, 602, 192 Fed. 695, the bankrupt filed his voluntary petition in bankruptcy not knowing that he had sufficient property to pay all his debts when in fact he did have. He scheduled the valid existing claims against him and included and scheduled an outlawed claim. This was duly approved and allowed. Later the bankrupt discovered that he had property more than sufficient to pay all his debts, and he (the bankrupt) then moved to expunge the

scheduled outlawed claim and that it be disallowed. No creditor objected or had objected to the proof and allowance of that claim, nor did the trustee in their behalf. This court discussed the whole situation, but all that it decided was that under such circumstances the bankrupt himself, and wholly in his own interest and in order to secure for himself the balance of his own estate after paying the claims which were *not* outlawed prior to making his schedules, could not allege that a claim which he scheduled as valid and subsisting was outlawed and barred by the statute; and that under the circumstances the creditor whose claim was barred *when the petition was filed* could share in distribution only after the others were paid in full.

Here creditors are objecting through the trustee who represents them. Here the question of the effect of a partial payment on an outlawed claim on the eve of filing a voluntary petition in bankruptcy as between creditors, those whose claims *were* and those whose claims *were not* barred by the statute of limitations at that time, is in question. In re Currier the question was between a solvent but alleged bankrupt in his own interest and his creditors.

There are very substantial reasons why an insolvent person on the eve of going into voluntary bankruptcy should not be permitted, as against his creditors whose claims are not barred by the statute of limitations, to renew by a small partial payment thereon those claims which are barred by the statute. Creditors whose claims are barred by the statute usually do not seek to enforce them by suit and judgment as they feel assured the debtor will plead the statute. If, then, a person who has been out of business seven or eight or more years, and who has no judgments against him and no claims against him which have accrued due within six years but does owe debts to a large amount barred by the statute, starts in business and obtains credit and purchases and has in possession a large amount of property recently purchased on credit, but finds himself unable to meet his obligations, he may make a small payment on each of his outlawed debts and then go into bankruptcy and both *ancient and modern* creditors, so to speak, will share in the distribution of the proceeds of such recently acquired property. This would operate as a fraud on his creditors whose claims were not barred by the statute. Still if there was no collusion and no reasonable cause on the part of the creditors receiving the payments to believe that a preference was intended, and the

defense of the statute is personal to the creditor until after a petition is filed, how can the court hold that such renewal by part payment is forbidden by any law? § 67e of the bankruptcy act provides that:

"All * * * transfers * * * of his property or any part thereof made, or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition *with the intent and purpose on his part* to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except," etc.

And the property so transferred remains a part of the bankrupt's estate. It would seem, not from direct evidence but from some statement or question asked, that some person had obtained a judgment against Banks, and we may infer that this was the reason of his going into bankruptcy. This is surmise, however. Assume this to be the case, we further infer that Banks made up his mind that all his creditors should share in his estate, those whose claims were barred by the statute and those whose claims were not so barred, and hence he made the payments referred to after the execution of, but before filing, his petition. Assume this to have been his purpose, was the transfer of the $1 on the occasion in question one "with the intent and purpose *on his part* (Banks) to hinder, delay, or defraud his creditors or any of them?" I am not prepared so to hold. So far as this court is informed, it has not been held that a payment made on account or on a note for the express purpose of renewing an outlawed claim of itself is or operates as a fraud on creditors within the meaning of the statute.

Suppose we take the position that the payment of the $1 on each of these claims, after the petition was verified but before it was filed, was the creation of new debts or obligations, and I am not able to find any law which will prevent their proof and allowance. The status of the claim must be determined as it existed at the time the petition was filed. Suppose the parties had figured up the accounts and Banks had given promissory notes intermediate the verification of the petition in bankruptcy and its filing, would or would not the claim be provable? I am of the opinion that Banks, as against his other creditors, in the absence of fraud and collusion, had the right to renew these claims at any time before he filed his petition. It does not appear that the Quencers, or either of them, knew Banks was

insolvent. It seems to me that the law has not prohibited the renewal of outlawed claims under such circumstances.

It is contended that there is nothing to show that the bankrupt intended to pay anything on an account or debt due for hay sold and delivered, but that the evidence discloses an intent to make a payment on a promissory note. A few days before the payments were made, the bankrupt made up his schedules of indebtedness which were attached to and formed a part of his petition in bankruptcy. Here he stated that he owed to John Quencer a note of $250 and to Philip Quencer a note of $250; that is, *debts evidenced* by such notes. The consideration of these notes is not mentioned in the schedules. It is evident that Banks at that time had in mind claims against himself in favor of the Quencers evidenced by notes, $250 to each. The date of the notes was not given. So far as appears, this was his state of mind and these the debts he had in mind when he went to the Quencers on the occasions mentioned. There was no conversation as to any indebtedness except Banks handed to each $1 and said he wanted to pay or paid the dollar to renew *the debt*. In fact, so far as the proof goes, no note had been given to one of the Quencers, but a note of $400 had been given to the other which he had handed back, under what conditions and for what reason does not appear. In fact, as the referee finds, Banks owed a balance to each of the Quencers for hay sold and delivered and nothing else; the claim, however, being barred by the statute. The contention is, nothing having been said regarding the nature or character of the debt, that Banks had notes in mind and intended to make a payment on notes and not on an account or claims for hay sold and delivered. But if there was only one claim or debt, and that for hay, is it material that Banks supposed he had given a note for the debt when in fact he had not? It is only material that a specific indebtedness was recognized and a payment made to apply on it as a partial payment of a greater indebtedness. If it was stated that the dollar was paid to renew the debt, a larger debt than $1, and there was but one debt, here is a plain recognition of a larger sum due than the amount paid and an implied promise to pay the remainder. If the debt was for hay, is it material that it was not evidenced by a promissory note as Banks supposed? On this subject see Crow v. Gleason, 141 N. Y. 489, 493, 494, 36 N. E. 497. This case is cited and approved Brooklyn Bank v. Barnaby, 197 N. Y. 210, 90 N. E. 834, 27 L. R. A. (N. S.) 843.

See, also, Hughes v. Eddy Valve Co., 147 App. Div. 356, 131 N. Y. Supp. 744, and Murphy v. Walsh, 113 App. Div. 423, 99 N. Y. Supp. 346. I think the claimants brought themselves within the principles enunciated in the cases cited.

I cannot hold that a payment made immediately before bankruptcy, or filing a petition in bankruptcy, to renew an outlawed debt and to enable the creditor to come in and share in the distribution, the one receiving it having no reasonable cause to believe it will operate as a preference, is a fraud on creditors or the law. * * *

On the whole, I am of the opinion that the order of the referee allowing the claims should be affirmed. So ordered.

(e) Enabling Creditor to Obtain Greater Percentage Than Others of Same Class[40]

SWARTS v. FOURTH NAT. BANK OF ST. LOUIS

117 Fed. 1, 54 C. C. A. 387

(Circuit Court of Appeals, Eighth Circuit. July 21, 1902)

On February 6, 1900, the Siegel-Hillman Dry Goods Company, a corporation, was adjudged a bankrupt on the petition of its creditors, which was filed on December 30, 1899. Four months before the filing of the petition, the Fourth National Bank of St. Louis held a claim of $60,000 against this corporation, which was evidenced by a series of promissory notes signed by the company, and indorsed by H. A. Loeb and B. Hillman, which amounted to $35,000, and by another series of promissory notes signed by the corporation, and indorsed by H. A. Loeb, B. Hillman, L. Regenstein, and F. Siegel & Bro., which aggregated $25,000. All the indorsements were placed upon these notes before they were discounted for the accommodation of the corporation, and for the purpose of giving credit to the notes, so that the indorsers stood in the relation of makers to the bank, and of accommodation makers or sureties to the dry goods company. Within four months preceding the filing of the petition in bankruptcy, the dry goods company, while it was insolvent, paid to the bank, which did not have reasonable cause to believe that it was intended thereby to give a preference, the sum of

40—As to who is a "creditor" see *infra*, Tit. Provable Claims, pp. 384-476.

$14,600 upon some of the notes which were indorsed by Siegel & Bro. On February 21, 1900, Siegel & Bro. paid the $10,400 and interest which remained unpaid upon the notes which they had indorsed, and subsequently proved up this payment as a claim against the estate of the bankrupt. The bank proved its claim against the bankrupt's estate for $35,000 and interest, based upon the notes which had been indorsed by Loeb and Hillman, but which did not bear the names of Regenstein or Siegel & Bro. The trustee moved to expunge the claim of the bank unless it surrendered the $14,600 which it had received from the estate of the bankrupt within four months preceding the filing of the petition. The referee granted the motion. The District Court reversed this decision, and directed the referee to deny the motion. From the decree to this effect, the trustee has appealed to this court.

SANBORN, C. J., after stating the case as above, delivered the opinion of the court.

May a creditor of a bankrupt whose claim is evidenced by numerous promissory notes secured by different indorsers or accommodation makers accept from the insolvent, within four months of the filing of the petition in bankruptcy against him, payment in part of the notes secured by the solvent indorsers, and then obtain the allowance of that portion of his claim against the bankrupt upon which the solvent indorsers were not liable, without a surrender of the payment he has thus obtained? This is the primary question which this case presents.

No one can become familiar with the bankrupt law of 1898 without a settled conviction that the two dominant purposes of the framers of that act were: (1) The protection and discharge of the bankrupt; and (2) the distribution of the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors. All the earlier sections of the act are devoted to the security and relief of the bankrupt, and, when the distribution of his property is reached, the provisions relating to it are all drawn from the standpoint of the insolvent, and not from that of his creditors. The rights and privileges of the bankrupt, and the equal distribution of his property, dominate every provision, while the rights, wrongs, benefits, and injuries of his creditors are always incidental, and secondary to these controlling purposes. § 60*a* contains the legal and controlling

definition of the preference specified in § 57*g* and the other parts of the bankrupt act. 30 Stat. c. 541, pp. 562, 560; Kimball v. E. A. Rosenham Co. (C. C. A.) 114 Fed. 85, 7 Am. Bankr. R. 718, 719; Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. ed. 1171. But this definition of a preference was not written from the station of the creditor, but from that of the debtor. It is not the act of the creditor, but the act of the debtor, which gives it,—which produces it. The controlling thought is not the benefit or injury to the creditor, but the equal distribution of the property of the bankrupt among the holders of the provable claims against him.

It is contended that there was no preference by the payment by the bankrupt of the $14,600 to the bank on the notes of its solvent indorsers, because the bank derived no benefit therefrom. It is said that the bank would have received the full payment of these notes from the indorsers of the bankrupt if nothing had been paid upon them by the corporation. The argument assumes a fact which does not really exist, for the presumption always is that cash in hand is more valuable and useful than the legal liability of any party to pay it. But, if the bank had derived no benefit from this payment, its legal effect would not have been different. When the authors of paragraph 60*a* prepared the legal definition of a preference, they were neither considering nor dealing with the promises, liabilities, payments, or acts of others than the bankrupt. They were treating of his property, and of the claims of his creditors against that property. The dominant purpose of the prohibition of a preference was not to benefit or injure, or to prevent the benefit or injury, of any creditor or class of creditors, but to prevent the debtor from making any disposition of his property which would prevent its equal distribution,—to prevent him from doing anything which would result in the payment out of his property of a larger percentage upon any claim than others of the same class would receive. The plain intention of Congress, and the legal effect of the paragraph, were to make every transfer of any of the insolvent's property, by means of which a larger percentage would be paid out of his estate to any creditor, or on any claim, than every other creditor and every other claim of the same class would receive, a preference to be surrendered or avoided under the other provisions of the statute. The meaning and effect of § 60*a* are the same as though it declared every transfer of his property by an insolvent to be a preference which has the

effect to "enable any one of his creditors to obtain a greater percentage of his debt" out of the property of the insolvent "than any other of such creditors of the same class." The test of a preference, under the act, is the payment, out of the bankrupt's property, of a larger percentage of the creditor's claim than other creditors of the same class receive, and not the benefit or injury to the creditor preferred. Marshall v. Lamb, 5 Q. B. 115, 126, 127.

Four months before the filing of the petition in bankruptcy, the bank had a claim against the estate of the insolvent for $60,000. Within that four months, it received $14,600 out of his estate, so that, when the petition in bankruptcy was filed, instead of a claim for $60,000 against the insolvent, it held $14,600 of his money, and a claim against him for $45,400. The statement of these facts is itself a demonstration that if the bank can retain this money, and procure the allowance of the balance of its claim, it will receive a greater percentage of its debt out of the estate of the insolvent than other creditors of the same class who receive no such payments. The insolvent has increased the funds of the bank $14,600, and it has diminished by $14,600 the property to be distributed among its creditors; and it is the depletion of the estate, to pay a larger percentage upon one claim against it than others of the same class will receive, against which the provisions of § 60*a* and § 57*g* are specifically leveled. The conclusion is irresistible that the payment to the bank of the $14,600 gave it a preference over the other creditors of the bankrupt of the same class.

It is, however, strenuously argued that, if the payment of this $14,600 created a preference, the bank should not be required to surrender it, because, after the adjudication in bankruptcy, Siegel & Bro., the solvent indorsers, paid the $10,400 remaining unpaid on the notes which they had indorsed, and proved this payment as a part of their claim against the estate of the bankrupt, while the claim which the bank has presented consists entirely of notes upon which Siegel & Bro. are not indorsers. But how does the fact that, since the filing of the petition in bankruptcy, the bank has assigned a portion of its claim to Siegel & Bro., by operation of law or otherwise, relieve it from its disability to prove any of its claim until it surrenders its preference? The bankrupt act prohibits the allowance of any claim of a creditor who has received a preference unless he has surrendered that preference. "The claims of creditors who have

received preferences shall not be allowed unless such creditors shall surrender their preferences." § 57*g*. The unequivocal language and the unquestionable legal effect of this section are to prohibit the allowance of any claim of a creditor who has received a preference, either upon that or upon any other claim he holds against the estate of the bankrupt, unless he has first surrendered his preference. Strobel & Wilken Co. v. Knost (D. C.) 99 Fed. 409; Electric Corp. v. Worden, 39 C. C. A. 582, 99 Fed. 400; In re Conhaim (D. C.) 97 Fed. 924; In re Rogers Milling Co. (D. C.) 102 Fed. 687; Collier, Bankr. (3d ed.) pp. 318, 319.

Under the act of 1898, the rights of claimants to share in the distribution of the estate of the bankrupt are fixed by the status of their claims at the time of the filing of the petition in bankruptcy. § 63; In re Bingham (D. C.) 94 Fed. 796. The petition in this case was filed on December 30, 1899. At that time the bank held a claim against the estate of the dry goods company for $45,400, $35,000 of which was evidenced by the notes of the bankrupt indorsed by Loeb and Hillman, while $10,400 was evidenced by the notes of the bankrupt indorsed by Loeb, Hillman, Regenstein, and Siegel & Bro. Siegel & Bro. were the only solvent indorsers. Our attention is here challenged to a late decision of the Circuit Court of Appeals for the seventh circuit in Doyle v. Bank, 24 Nat. Corp. Rep. 406, 116 Fed. 295, in which it is held that a creditor who holds a promissory note of the bankrupt, secured by an indorser, is in a different class from one who holds the bankrupt's note without any indorser, within the meaning of paragraph 60*a*, so that the bankrupt may pay the former's note without creating any preference which must be surrendered by the creditor before his claim based upon the unindorsed note can be allowed. This decision is cited to support the position that the bank is in a different class with its claim upon the $35,000, from that in which it is with its claim for $10,400. It must be conceded that, if a creditor holding the bankrupt's note with no indorser is in a different class from one holding it with one indorser, one holding his note with two indorsers must be in a different class from either of the others, because the third note is marked by exactly the same difference from the second note as the second is from the first, the difference of one indorser,—while the difference between the first note and the third note is twice as great. Nor, if it be conceded that a creditor with one indorser is in a different class from one with

no indorser, can it be successfully contended that a creditor with four indorsers, some of whom, are solvent, as is the case in respect to the $10,400 here in question, is in a different class from one with two indorsers who are insolvent, as in the case of the notes for $35,000 under consideration. The character of the court which rendered this decision, the learning and ability of the judges who compose it, and the great respect its opinions always command, have impelled us to a careful consideration of the conclusion it announces, and of the opinion which supports it. But their logical effect is to create such a multitude of classes of creditors, to so confuse the administration of that portion of the bankrupt law which treats of preferences, and to open so plain a way to the nullification of paragraph 57*g* of the bankrupt act, that we hesitate to follow them. If a debtor may pay his indorsed paper within four months of the filing of the petition in bankruptcy against him, without creating a preference of the creditor so paid, that will bar the allowance of his claim on open account or on unindorsed paper, the way to payments and transfers by a bankrupt which will actually prefer creditors, but which will not fall under the ban of the bankrupt law, is plain and smooth. All that the debtor needs to do, to evade the provisions of this act for the surrender of preferences, is to give indorsed paper for the part of his debts which he proposes to pay, and the creditor may then receive the actual, and escape the legal, preference with impunity. We are not yet prepared to adopt a rule fraught with such consequences.

While it is true that the bankrupt act does not define the word "class," nor in terms state what creditors are in the same class, it creates some classes, and specifies others, and it seems to us that the meaning of the word "class" in the act should, if possible, be derived from the statute itself. § 64, after directing the payment of certain expenses of administration, creates three classes of creditors,—parties to whom taxes are owing, employes holding claims for certain wages, and those who, by the laws of the states or of the United States, are entitled to priority. §§ 56*b*, 57*e*, and 57*h* provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims, and the general creditors of the estate, constitute the classes of creditors of which the bankrupt act treats. Now, if any one of these various classes is taken by itself and examined, it will be seen that each one of the creditors in the same class always receives the same per-

centage upon his claim, out of the estate of the bankrupt, that every other creditor of his class receives. Where the estate is insufficient to pay the claims of different classes in full, the classes receive, out of the bankrupt estate, different percentages of their claims, but creditors of the same class receive the same percentage. The test of classification is the percentage paid upon the claims out of the estate of the bankrupt.

Here, again, in considering this question of classification, it is well to bear in mind that this act was drawn from the station of the bankrupt, and that its primary purposes were to relieve the bankrupt, and to distribute his property equally among his creditors. The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend, out of the estate of the bankrupt than that estate will pay on other claims of the same class. It is its effect upon the equal distribution of the estate of the bankrupt, not its effect upon the creditor, that determines the preference. The same dominant thought controls and determines the classification of the creditors. Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. Their relations to third parties, their right to collect of others, the personal security they may have through indorsements or guaranties, receive no consideration, no thought. It is the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences.

Now take the case in hand, or the simpler case of a creditor who has one of the bankrupt's notes with a solvent indorser and another without any indorser. He is entitled to receive the same percentage out of the estate of the bankrupt on his indorsed note that he is on that which is not indorsed. It is true that he has the right to collect the former of the indorser. But, if he does, the indorser may prove the note, and receive exactly the same percentage upon the claim that the original creditor would receive upon the note which was not indorsed. § 57*i*. The two notes bear exactly the same relation to the estate of the bankrupt whether indorsed or not,—whether paid by the indorser or not,—and for this reason they and their holders stand in the same class. They are in the same class because it is the relation

of the creditors, and their claims to the estate of the bankrupt, and not their relation to third parties, that determines their rights, and fixes their status, under the bankrupt act of 1898. We are not persuaded that a creditor who holds an indorsed note of a bankrupt is in a different class from one who holds his note without an indorsement, under § 60*a* of the bankrupt act, because the legal result of such a conclusion would lead to the creation of new and numerous classes of creditors not specified in the bankrupt act; because that conclusion would open a plain way to evade the provisions of § 57*g;* because the definition of the term "class" as used in the bankrupt act should be derived from that statute itself; and because the true test of the classification of creditors under that act is the percentage which, in the absence of preferences, their claims are entitled to draw out of the estate of the bankrupt, and the holder of an unindorsed note is entitled to the same percentage from the estate as the holder of an indorsed note. Creditors who, in the absence of preferences, are entitled to receive the same percentage upon their claims out of the estate of the bankrupt, are members of the same class. Those who are entitled to different percentages are of different classes. The result is that the bank as holder of the notes for $10,400, upon which there were four indorsers, was in the same class as it was as the holder of the notes for $35,000, on which there were but two indorsers. On December 30, 1899, it had received a preference of $14,600, and it was forbidden to prove any part of its claim until it surrendered this preference.

These facts fastened upon the entire claim of the bank an attribute of disqualification for allowance. The ban of the statute was upon the claim. The act declares that the claims of creditors who have received preferences shall not be allowed unless the creditors surrender their preferences. This disqualification inheres in every part, every dollar, of the claim of the bank. The holder of this claim could not qualify it for allowance by transferring the whole or a part of it to another, nor could Siegel & Bro. accomplish this result by paying the notes on which they were indorsers, and becoming their owners by subrogation. Every part of the claim, whether retained by the bank or assigned to another, remained, and will remain, disqualified for allowance until the $14,600 whose payment constitutes the preference is surrendered. The claim of the bank, therefore, must be expunged unless it repays to the trustee the $14,600

which it received from the insolvent within four months prior to the filing of the petition in bankruptcy. * * *

(f) Intent to Prefer

TOOF v. MARTIN

13 Wall. 40

(United States Supreme Court. December Term, 1871)

Error to the Circuit Court for the District of Arkansas; the case being thus:

The 35th section of the bankrupt act of 1867, thus enacts:

"That if any person, being insolvent, or in contemplation of insolvency, with a view to give a preference to any creditor or person having a claim against him * * * makes any assignment, transfer, or conveyance of any part of his property * * * (the person receiving such assignment, transfer, or conveyance, having reasonable cause to believe such person is insolvent, and that such assignment or conveyance is made in fraud of the provisions of this act), the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it or so to be benefited."

With this enactment in force, Martin, assignee in bankruptcy of Haines and Chetlain, filed a bill in the District Court for the Eastern District of Arkansas, against J. S. Toof, C. J. Phillips, and F. M. Mahan, trading as Toof, Phillips & Co. (Haines and Chetlain being also made parties), to set aside and cancel certain conveyances alleged to have been made by these last in fraud of the above-quoted act.

Haines and Chetlain were, in February, 1868, and had been for some years before, merchants, doing business under the firm name of W. P. Haines & Co., at Augusta, Arkansas. On the 29th of that month they filed a petition for the benefit of the bankrupt act, and on the 28th of May following were adjudged bankrupts, and the complainant was appointed assignee of their estates. On the 18th of the previous January, which was about six weeks before the filing of their petition, they conveyed an undivided half-interest in certain parcels of land owned by them at Augusta, to Toof, Phillips & Co., who were doing business at Memphis, in Tennessee, for the consideration of $1,876, which sum was to be credited on a debt due from them to that firm. At the same time they assigned to one Mahan, a member

of that firm, a title-bond which they held for certain other real property at Augusta, upon which they had made valuable improvements. The consideration of this assignment was two drafts of Mahan on Toof, Phillips & Co., each for $3,034, one drawn to the order of Haines, and the other to the order of Chetlain. The amount of both drafts was credited on the debt of Haines & Co. to Toof, Phillips & Co., pursuant to an understanding to that effect made at the time. There was then due of the purchase-money of the property, for which the title-bond was given, about $700. This sum Mahan paid, and took a conveyance to himself from the obligor who held the fee.

The bill charged specifically that at the time these conveyances were made the bankrupts were insolvent or in contemplation of insolvency; that the conveyances were made with a view to give a preference to Toof, Phillips & Co., who were the creditors of the bankrupts; that Toof, Phillips & Co. knew, or had reasonable cause to believe, that the bankrupts were then insolvent, and that the conveyances were made in fraud of the provisions of the bankrupt act.

It also charged that the assignment of the title-bond to Mahan was in fact for the use and benefit of Toof, Phillips & Co., for the purpose of securing the property or its value to them in fraud of the rights of the creditors, and that this purpose was known and participated in by Mahan.

The answer, admitting a large amount of debts at the time of the conveyances in question, denied that the bankrupts were then "insolvent," asserting, on the contrary, "that at the time aforesaid said Haines & Co. had available assets in excess of their indebtedness to the extent of $16,000." It also denied that there was a purpose to give a preference; asserting that the conveyances of the land were made because Haines & Co., not having cash to pay the debt due Toof, Phillips & Co., were willing to settle in property; and it denied that the title-bond was assigned to Mahan for the benefit of Toof, Phillips & Co., or that they paid for the same; but on the contrary averred that Mahan bought the property and paid for it himself, and for his own use and benefit, out of his own funds.

Appended to the bill were several interrogatories, the first of which inquired whether at the time of making the transfers to Toof, Phillips & Co. the indebtedness of W. P. Haines & Co. was not known to be greater than their immediate ability to pay; and to this Toof, Phillips & Co. answered that at the time of

making these transfers they did not believe Haines & Co. were able to pay their debts *in money*, but that they were able to do so on a fair market valuation of the property they owned, and of their assets generally.

Chetlain, one of the bankrupts, testified that on the 18th of January, 1868, Haines & Co. could not pay their notes as they came due; that previous to this time they had contemplated bankruptcy, and that he had had several conversations with Mr. F. M. Mahan, relative to their finances, and had told him the amount, or near the amount, of their debts. His advice was to get extensions, and he would help them get through; that after his promises to advance them more goods, they concluded not to go into bankruptcy, but to go on in business; that he told Mahan that Haines & Co. could not pay out; and in a conversation with him previous to the transfer of the real estate, he, Chetlain, told Mahan that such was the state of the finances of Haines & Co. that if he would assume their liabilities, and give them a receipt, Haines & Co. would turn over all their assets to him. He did not accept.

He also testified that about the 1st of January, 1868, the sheriff levied on the goods belonging to Haines & Co., in their storehouse in Augusta, on an execution in favor of one Weghe, which caused them to suspend business for a few days, until the levy was dissolved by order of the sheriff, at or about the 15th day of January, 1868. Mahan was in Augusta at the time of this levy, and Haines & Co. had an interview with him in regard to it.

During the entire autumn and winter preceding these transfers, Haines & Co. did not pay, except to Toof, Phillips & Co., more than $500 on all their debts; and in the latter part of December, 1867, and the first part of January, 1868, some of the creditors sent agents to collect money from them, but got none, because Haines & Co. had no funds to pay them.

A witness, Frisbee, testified that he had assisted Mr. Haines in making up his balance-sheet "about the 1st of January, 1868, and that the result was that their available assets were not sufficient to pay their debts."

Another witness, an agent for an express company, testified that he received, about the last of December, 1867, or January, 1868, notes from Toof, Phillips & Co. and another firm, against Haines & Co. for collection; that he presented them for payment to Haines & Co., and that they said they could not pay them at

that time. They did not pay them to him. He knew something of the financial condition of Haines & Co., and of their debt to Toof, Phillips & Co., and of complaints of other parties, and something of their business through the country, and from all these facts he thought it doubtful about their being able to pay their debts. This was during the months of December, 1867, and January, 1868; and he wrote to Toof, Phillips & Co. that he thought they had better look to their interests, as his conviction was that it was doubtful about their being able to collect their debt from Haines & Co. Shortly after writing this letter Mahan came round to look after the matter.

The property described in the title-bond assigned to Mahan, which he stated that he purchased as an investment on private account for $7,000, was shown by the testimony of Chetlain to have been worth only $4,000, and by the testimony of a witness, Hamblet, to have been worth only $3,500, and it was valued by the bankrupts in their schedules at $4,000. Both of the bankrupts testified that it was understood at the time the title-bond was assigned to Mahan, that the amount of the two drafts given by him on Toof, Phillips & Co. for it, should be credited to Haines & Co. on their indebtedness to that firm.

The schedules of the bankrupts annexed to their petition showed that their debts at the time of their transfers to Toof, Phillips & Co., exceeded $59,000, while their assets were less than $32,000.

On the other hand there was some testimony to show that some persons thought that they could get through, etc., etc.

The District Court decreed the conveyances void, and that the title of the property be vested in the assignee, the latter to refund the amount of the purchase-money advanced by Mahan to obtain the deed of the land described in the title-bond, less any rents and profits received by him or Toof, Phillips & Co., from the property. This decree the Circuit Court affirmed.

In commenting upon the answer of Toof, Phillips & Co., already mentioned, which, in reply to the interrogatory, "whether at the time of the transfer to them the indebtedness of Haines & Co. was not greater than their ability," admitted that they did not believe Haines & Co. "able to pay their debts *in money*," the Circuit Court said:

"Here is a direct confession of a fact that in law constitutes insolvency, and it is idle for the defendants to profess ignorance of the insolvency of the bankrupts in face of such a confession.

If the bankrupts could not pay their debts in the ordinary course of business, that is, *in money*, as they fell due, they were insolvent, and if the defendants did not know that this constituted insolvency within the meaning of the bankrupt act, it was because they were ignorant of the law."

But that court examined all the testimony, and in affirming the decree of the District Court, rested the case upon it, as well as upon this answer. From the decree of the Circuit Court, Toof, Phillips & Co., brought the case here.

Mr. Justice FIELD delivered the opinion of the court.

The bill presents a case within the provisions of the first clause of the thirty-fifth section of the bankrupt act. That clause was intended to defeat preferences to a creditor, made by a debtor when insolvent or in contemplation of insolvency. It declares that any payment or transfer of his property made by him whilst in that condition, within four months previous to the filing of his petition, with a view to give a preference to a creditor, shall be void if the creditor has at the time reasonable cause to believe him to be insolvent, and that the payment or transfer was made in fraud of the provisions of the bankrupt act. And it authorizes in such case the assignee to recover the property or its value from the party who receives it.

Under this act it is incumbent on the complainant, in order to maintain the decree in his favor, to show four things:

1st. That at the time the conveyances to Toof, Phillips & Co. and Mahan were made the bankrupts were insolvent or contemplated insolvency;

2d. That the conveyances were made with a view to give a preference to these creditors;

3d. That the creditors had reasonable cause to believe the bankrupts were insolvent at the time; and,

4th. That the conveyances were made in fraud of the provisions of the bankrupt act.

1st. The counsel of the appellants have presented an elaborate argument to show that inability to pay one's debts at the time they fall due, *in money*, does not constitute insolvency, within the provisions of the bankrupt act. The argument is especially addressed to language used by the district judge when speaking of the statement of the appellants in answer to one of the interrogatories of the bill, to the effect that at the time the transfers were made they did not believe the bankrupts were able to

pay their debts *in money*, but were able to do so on a fair market valuation of their property and assets. The district judge held that this was a direct confession of a fact which in law constitutes insolvency, and observed that "if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent."

The rule thus laid down may not be strictly correct as applied to all bankrupts. The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts, as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of Congress. It was of the bankrupts as traders that the district judge was speaking when he used the language which is the subject of criticism by counsel.

With reference to other persons not engaged in trade or commerce the term may perhaps have a less restricted meaning. The bankrupt act does not define what shall constitute insolvency, or the evidence of insolvency, in every case.

In the present case the bankrupts were insolvent in both senses of the term at the time the conveyances in controversy were made. They did not then possess sufficient property, even upon their own estimation of its value as given in their schedules, to pay their debts. These exceeded the estimated value of the property by over twenty thousand dollars. And for months previous the bankrupts had failed to meet their obligations as they matured. Creditors had pressed for payment without success; their stock of goods had been levied on, and their store closed by the sheriff under an execution on a judgment against one of them. It would serve no useful purpose to state in detail the evidence contained in the record which relates to their condition. It is enough to say that it abundantly establishes their hopeless insolvency.

2d. That the conveyances to Toof, Phillips & Co. were made with a view to give them a preference over other creditors hardly admits of a doubt. The bankrupts knew at the time their insolvent condition. A month previous they had made up a balance sheet of their affairs which showed that their assets were

insufficient to pay their debts. They had contemplated going into bankruptcy in December previous, and were then pressed by numerous creditors for payment. Their indebtedness at the time exceeded $50,000, and except to Toof, Phillips & Co. they did not pay upon the whole of it over $500 during the previous fall and winter. Making a transfer of property to these creditors, under these circumstances, was in fact giving them a preference, and it must be presumed that the bankrupts intended this result at the time. It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy.

No such proof was made or attempted in this case. But, on the contrary, the evidence shows that the conveyances were executed upon the expectation of the bankrupts, and upon the assurance of Toof, Phillips & Co., that in consequence of them they would continue to sell the bankrupts goods on credit, as they had previously done; and that no arrangement was made by the bankrupts with any other of their creditors, either for payment or security, or for an extension of credit.

The fact that the title-bond was assigned, and the property for which it was given was conveyed to Mahan alone, and not to Toof, Phillips & Co., does not change the character of the transaction. Mahan was a member of that firm, and the conveyance was made to him with the understanding that the sum mentioned as its consideration should be credited on the indebtedness of the bankrupts to them. Both of the bankrupts testified that such was the understanding at the time. The pretense that Mahan bought the lots as an investment on private account will not bear the slightest examination. It is in proof that the lots at the time were only worth $4,000 at the outside, yet the consideration given was nearly $7,000. Toof, Phillips & Co. might well have been willing to credit this amount on their claim against insolvent traders in consideration of obtaining

from them the possession of property of much less value, but it is incredible that an individual, seeking an investment of his money, would be careless as to the difference between the actual value of the property and the amount paid as a consideration for its transfer to him.[41]

3d. From what has already been said it is manifest not only that the bankrupts were insolvent when they made the conveyances in controversy, but that the creditors, Toof, Phillips & Co., had reasonable cause to believe that they were insolvent. The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business. That such a state of facts was brought to the notice of the creditors is plainly shown. Chetlain, one of the bankrupts, testifies that previous to the execution of the conveyances he had several conversations with Mahan respecting their finances, and told him the amount or near the amount of their indebtedness, and that they could not pay it. Mahan advised them to get extensions, and said that he would help them to get through. Chetlain also testifies that such was the state of the finances of the bankrupts that on one occasion, in conversation with Mahan, they offered to turn over to him their entire assets if he would assume their liabilities and give them a receipt, and that he declined the offer.

It also appears in evidence that the levy by the sheriff upon the stock of goods of the bankrupts, already mentioned, which was made in January, 1868, caused a temporary suspension of their business, and that Mahan was in Augusta at the time and had an interview with the bankrupts on the subject of the levy.

It also appears that about the last of December, 1867, or the first of January, 1868, Toof, Phillips & Co. sent notes of the

41—See Wager v. Hall, 16 Wall. 584, 602; Western Tie & Timber Co. v. Brown, 196 U. S. 502; Naylon & Co. v. Christiansen Harness Mfg. Co., 158 Fed. 290; In re McDonald & Sons, 178 Fed. 487; Kimmerle v. Farr, 189 Fed. 295.

See also First Nat. Bank v. Jones, 21 Wall. 325.

bankrupts which they held to an agent in Augusta for collection. The agent presented the notes for payment to the bankrupts and was told by them that they could not pay the notes at that time. The agent then wrote to Toof, Phillips & Co., that they had better look to their interests, as his conviction was that it was doubtful whether they would be able to collect their debts. Shortly after this Mahan went to Augusta to look after the matter, and whilst there the conveyances in controversy were made.

It is impossible to doubt that Mahan ascertained, while thus in Augusta, the actual condition of the affairs of the bankrupts. The facts recited were sufficient to justify the conclusion that they were insolvent, or at least furnished reasonable cause for a belief that such was the fact.

4th. It only remains to add that the creditors, Toof, Phillips & Co., had also reasonable ground to believe that the conveyances were made in fraud of the provisions of the bankrupt act. This, indeed, follows necessarily from the facts already stated. The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act. That such was the effect of the conveyances in this case, and that this effect was intended by both creditors and bankrupts, does not admit, upon the evidence, of any rational doubt. A clearer case of intended fraud upon the act is not often presented.

Decree affirmed.

GOODLANDER-ROBERTSON LUMBER CO. et al. v. ATWOOD

152 Fed. 978, 82 C. C. A. 109

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907)

McDOWELL, D. J. On March 27, 1906, three of the creditors of W. J. Atwood, a dealer in lumber in Norfolk, Va., filed a petition, praying that Atwood be adjudicated an involuntary bankrupt. The alleged act of bankruptcy was the payment by Atwood to the Hardwood Lumber Company, a creditor, of $160 on February 27, and of $121.15 on March 6, 1906, being then insolvent, with intent to prefer the said lumber company over his other creditors. The plea of the bankrupt to the petition

consisted of a denial of the commission of the act of bankruptcy alleged in the petition. A jury trial was not demanded, and the evidence was adduced orally before the trial court, whereupon an order was entered dismissing the petition. The petitioning creditors have appealed.

It appears that the Hardwood Lumber Company sustained no relation to the alleged bankrupt other than that of one of several creditors, and that no sort of reason existed why Atwood should have desired or intended to prefer such creditor to any other creditors. The collections were made by an attorney, and the payments were made in the ordinary course of business and to avoid suit. At the time the payments were made Atwood was insolvent in the sense in which the word is used in the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544, § 1, cl. 15 [U. S. Comp. St. 1901, p. 3419]). He was indebted to about the sum of $20,000—but much of this was not then due, and his salable property did not exceed $1,500. He did have, however, a knowledge of a rather technical and not easily learned business and a custom or "good will" which has been apparently disregarded by counsel for appellants. The question in the case is whether or not the payments were made (Bankr. Act. § 3, cl. 2) with intent to prefer. From a careful reading of the evidence we are satisfied that Atwood did not regard himself as insolvent; that he made the two payments in question, as he had been doing previously, in the ordinary course of business, and without intent to prefer the creditor. He did know that his cash receipts were not at all times sufficient to enable him to meet the bills against him promptly. But he did not regard himself as doomed to failure. In fact the evidence leads us to believe that he expected to continue in business, to meet his obligations as they fell due and that he had by no means lost hope of ultimate success. The sums which he paid were just debts, then due, rather trifling in amount when considered in connection with the business he was doing, and they were paid in order to be able to continue in business and to avoid suit. If Congress had intended that a payment made under such circumstances as we have here should be an act of bankruptcy, the language of § 3, cl. 2, of the act would have been very different. As it is written, the law makes such payments acts of bankruptcy only when made with "intent to prefer."

It is argued that every man is presumed to intend the necessary consequences of his acts. But the defendant had no reason

to suppose that such consequences would be an involuntary petition in bankruptcy, the seizure of his property by a receiver and the consequent ruin of his credit and destruction of his business. The consequences of making the payments in question reasonably to be expected were a continuance in business with the prospect of an ultimate payment of all of the creditors in full. An intent to prefer is an intent that some particular creditor shall receive a greater percentage of his debt than the other creditors of the same class. In the case at bar the evidence negatives the existence of such intent.

The judgment of the trial court is affirmed.

MACON GROCERY CO. et al. v. BEACH

156 Fed. 1009

(District Court, S. D. Georgia, N. D. October 1, 1907)

SPEER, District Judge. The Macon Grocery Company and other creditors made petition, by which it was sought to obtain an adjudication of involuntary bankruptcy against Asa N. Beach. The indebtedness of Beach amounted to about $13,000. The amount of his assets is not stated, and the proceeding is obviously brought as a basis for an equitable application to the bankruptcy court, designed to subject large values which in one way and another had been conveyed by Beach to a Miss Julia Dixon, whose agent for a long time he had been. Miss Dixon is an aged and infirm lady, and Beach was the adopted child of her parents. Her property consisted of plantations, other real estate, and money. It is contended by the petitioning creditors that, while Beach pretended to be the agent for Miss Dixon, they both entered into a general scheme to defraud his creditors. This, it is insisted, was evidenced through the execution by Beach of mortgages to Miss Dixon to secure an alleged indebtedness to her of $11,817. To give the court jurisdiction to make a decree or decrees canceling the conveyances of Beach to Miss Dixon, and recovering for the benefit of creditors the property he conveyed, it must first be made to appear that Beach is a bankrupt as alleged.

To accomplish this, the plaintiffs make four averments of bankruptcy. The first is that Beach, while insolvent, drew a draft on Little, Williams & Co., cotton brokers, in favor of the Louisville Drug Company, for $19.85, and that this payment was

made on October 1, 1901, with intent to prefer the drug company over other creditors. The second is that the defendant did on the same date pay to J. J. Keith, one of his creditors, the sum of $2.75, with intent to give him a preference. The third is an alleged preference given to R. L. Bostick, by draft on Little, Williams & Co. for $100. This was paid on September 17, 1901. The fourth is an alleged preference in favor of the Bank of Louisville by the payment of $500. To these charges Beach made answer. The answer did not admit insolvency; but this was admitted in *judicio* by his attorney, and also by his brief presented to the court. He denied that the acts specified were acts of bankruptcy. The first, third, and fourth payments, he alleged, were made by him as the agent of Miss Dixon, and with her means. As to the second charge, he admitted the payment of the $2.75 to Keith, but denied that this was done with intent to give him a preference. He also answered that he was chiefly engaged in farming and the tillage of the soil, and for this reason insisted that he could not, in terms of the law, be adjudged an involuntary bankrupt.

On the issues thus made much testimony was taken by the contending parties. Finally, by agreement and consent of counsel, the evidence and the issues presented were referred to J. N. Talley, Esq. (who is the standing master in chancery), as special master, with direction to report "his findings and the conclusions upon the law and the evidence, for such action of the court in the premises as shall seem proper." In an elaborate report, scrutinizing every phase of the controversy, the master finds, first, that Beach is not entitled to exemption from the operation of the bankruptcy law and that he is not chiefly engaged in agriculture. He then sustains the contentions of Beach as to the first, third, and fourth alleged acts of bankruptcy, and finds that such payments were made in behalf of Miss Dixon, and not by Beach from his own assets. The counsel for both parties probably recognizing that by their consent reference they have designated a tribunal whose findings on the facts will rarely be disturbed by the court (Chicago Motor Vehicle Co. v. American Oak Leather Co., 141 Fed. 520, 72 C. C. A. 576, Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. ed. 764), no exception is made by the defendant to the finding that Beach is not exempt from the operation of the law because of his contention that his chief pursuit is agriculture, and none by the petitioners

to the findings on the first, third, and fourth grounds, that the several payments were made as agent for Miss Dixon.

The master, however, finds that Beach, while insolvent, committed an act of bankruptcy, as set forth in the second charge, for the reason that while insolvent, and within four months prior to the filing of the petition in bankruptcy, he paid the sum of $2.75 to J. J. Keith, one of his creditors. This payment is not denied. It is evidenced by the receipt from Keith, which recites the items of the account. This is as follows:

"Louisville, Ga., Jan. 22, 1902.

"Mr. A. N. Beach, to J. J. Keith, Dr. Fancy Groceries, Finest Soda Water and Cream.

1901.				
June	13	To	Soda Water	$ .05
	22	"	Bar Soap	.05
July	6	"	Lemonade	.05
	"	"	Soda	.05
	9	"	Lemonade	.05
	"	"	Soda	.05
	20	"	Lemonade	.05
	"	"	Coca Cola	.05
	24	"	Lemonade	.05
August	26	"	"	.05
Sept.	5	"	"	.05
	6	"	"	.05
	7	"	1 Dressed Doll	2.15
				$2.75

"Received from A. N. Beach cash for above acct.

"Oct. 7th, 1901. J. J. Keith, Jne."

The question to be determined, then, is: Does this payment by Beach, while insolvent, constitute an act of bankruptcy? The oral evidence in the record with regard to this alleged preference is found solely in the testimony of Beach himself, as follows:

"On October 7, 1901, I paid $2.75 to J. J. Keith. It was my debt. The consideration of the debt is shown by the items on the receipted bill. * * * I got the dressed doll for a present. When I paid this little bill to J. J. Keith on October 7, 1901, I owed for mercantile debts something like $13,000, including the

debts due the petitioning creditors. In addition to those of petitioning creditors, I owed several thousand dollars of other debts. When I paid this debt to J. J. Keith, I did not have in mind any of my mercantile and other creditors. I did not pay this debt to J. J. Keith in order to prefer him over my other creditors. In paying this account, it was not my purpose to give J. J. Keith an advantage over my creditors. I did not consider the amount paid Keith a debt."

The relating statutory clause is § 3*a* (2) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), as follows:

"Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors."

Can it be, in view of the trivial amount paid by Beach, the character of his purchases, and the general aspect of the transaction, that this must be regarded as a transfer of a portion of his property to a creditor, with intent to prefer such creditor over his other creditors, which will cast his entire estate into bankruptcy. Very great respect should be accorded to the finding of the master, who resolved this question in the affirmative. His report was thoroughly considered, and his reasoning is impressive. It is also true that to adopt literally the deliverances of many courts of acknowledged authority would be to sustain his finding. The strong consensus of opinion on this topic among the courts is clearly stated in Webb v. Sachs, 15 N. B. R. 171, Fed. Cas. No. 17,325. The decision is by the District Court of Oregon. There it was held that:

"If a debtor, with knowledge of his insolvency, does an act which operates as a preference to one of his creditors, he is presumed to have so intended, as that is the necessary consequence of his act; and the additional fact that such debtor was really moved to give such preference for any other or particular reason, such as to save costs or satisfy the solicitations of an importunate creditor, or preserve his good will, or keep up his business, does not affect such presumption. Whatever the debtor's motive may be, he is presumed to intend the natural and necessary consequences of his acts."

See, also, Johnson v. Wald, 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84 (opinion by Circuit Judge Shelby of the Fifth Circuit); Morgan & Co. v. Mastick, 2 N. B. R. 521, Fed.

Cas. No. 9,803; Miller v. Keys, 3 N. B. R. 224, Fed. Cas. No. 9,578; In re Smith, 3 N. B. R. 377, Fed. Cas. No. 12,974; In re Silverman, 4 N. B. R. 523, Fed. Cas. No. 12,855; In re Oregon Printing Co., 13 N. B. R. 503, Fed. Cas. No. 10,559.

It is also held, with strong reason, that the testimony of a party himself that he had not a preferential intent is entitled to very little weight, where such intent is plainly presumable. Oxford Iron Co. v. Slafter, 13 Blatch. 455, 14 N. B. R. 380, Fed. Cas. No. 10,637; In re Wright Lumber Co. (D. C.) 114 Fed. 1011. Many other authorities might be cited to the same tenor and effect. It will be found, however, that in each of these cases a substantial preference had been made, that the preferential intent was always inferable, and that the consequent injury to other creditors was significant and distinct. The basic reason upon which all of these determinations are founded is substantially that every person of a sound mind is presumed to intend the necessary, natural, and legal consequences of his deliberate acts. In each case the insolvency of the bankrupt was conceded or proven. Then, when he has made a payment to a particular creditor, he is presumed to have the intent to prefer him, as it will enable that creditor to obtain a greater percentage of his debt than will inure to others. But if the payment on the debt is of that infinitesimal sort that it can have no perceptible consequence, is an intent to prefer a necessary, natural, and legal consequence of such payment? It would seem that the substantial or important character of a payment or transfer must *ex necessitate* possess large evidential effect to show the intent to prefer. This may be gathered from the statement of Mr. Justice Field, in Toof v. Martin, 13 Wall. 40, 20 L. ed. 481. Speaking for the court in that case, that great jurist declares:

"It is a general principle that every one must be presumed to intend the necessary consequences of his act. The transfer in any case by the debtor of a large part or all his property while he is insolvent to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him. * * *"

If this is true, the converse would seem also true. If the alleged bankrupt, although aware of his insolvency, should make a payment of an amount not a large part of his means, but utterly trivial—a payment to which no creditor, in the absence of litigation, would possibly object—it is at least debatable whether such payment must necessarily demonstrate the unlawful intent

to give a preference to one creditor to the injury of others. The doctrine which we are discussing, and which the courts have so strongly stated, presupposes that the payment is injurious to the other creditors. But where the facts show that no injury, of which the law would or could take an account, would result, the reason of the rule ceasing, it seems that the rule itself would cease. This is illustrated by the remarks of Judge Bellinger in Re Gilbert, 112 Fed. 951, 8 Am. Bankr. Rep. 101, in the District Court of Oregon, decided in 1902. The case was a petition for involuntary bankruptcy, and the learned judge observed:

"The presumption arising from the transfer of property is affected by the amount of such transfer. Thus, where the transfer was of all one's property, this was held to afford a violent—almost conclusive—presumption of an intent to prefer, where other creditors were unprovided for. * * * In this case the transfer was of a comparatively small part of the property of A. T. Gilbert—so small that the expediency of resorting to a bankruptcy court, rather than permit a distribution of the assets of the bank through the pending proceedings in the State Court, may be doubted. If the preferences complained of are set aside, it will add not more than 1 per cent. to the dividends to be paid the general creditors."

Again, in Re Douglass Coal & Coke Co. (D. C.) 131 Fed. 769, it was held that the small size of the payment may be looked to as a circumstance, in connection with others, to justify the conclusion that no preference was intended. The language of the court is as follows:

"Payments of comparatively small sums of money by an insolvent corporation to each of a number of its creditors, made in the usual course of business, do not raise a presumption of an intent to prefer such creditor over its other creditors, so as to establish an act of bankruptcy by a transfer of property with intent to prefer, within [the] bankruptcy act. * * *"

A fortiori, would one trifling payment to one creditor fail to evoke such presumption. The ruling in that case was by the referee, but the District Court of the Eastern District of Tennessee, in affirming the referee, while recognizing the insolvency of the defendant, observed:

"I nevertheless do not think that a presumption of intent to prefer should be indulged against an insolvent debtor by the mere act of paying certain creditors small sums in the usual course of business, and apparently in the effort to keep its busi-

ness going, unless there is other and further evidence showing a specific intent to thereby give such creditors an undue preference over others, although such might be the effect of the payment."

Again, in Driggs v. Moore, 3 N. B. R. 602, Fed. Cas. No. 4,083, it was held that payments, made in the usual and ordinary course of trade, and at the time the debt matures, and in the usual mode of paying debts, are *prima facie* valid.

These citations are perhaps ample to show that the authorities are not in entire accord upon this question. From their consideration we have reached the conclusion that even though a bankrupt has knowledge of his insolvency, if the payment is trivial and is made for the current and obvious expenses of one's daily life and habits, there is no hard and fast rule which will oblige the court to regard the transaction inimical to the bankruptcy law; nor, by parity of reasoning, do we deem the court obliged to conclude, because the other creditors might each have received an infinitesimal benefit, if the payment had not been made, that such payment necessarily, naturally, and logically shows an intent to prefer such creditor over the other creditors. Indeed, the payment here upon which the creditors rely seems to afford a fit occasion for the application of the maxim; "*De minimis non curat lex.*" Since the debts of Beach amounted to $13,000, and since his payment to Keith was of only $2.75, the disadvantage which each creditor suffered because of such payment was less than 1/4000 of his debt. For instance, one of the petitioning creditors, whose claim amounts to $84, would receive but a fraction over 1 cent. Can such a payment, then, justify the presumption that Beach intended a preference? We do not think so. The transaction was a bagatelle. It was neither immoral nor fraudulent. To apply the general presumption here would make it dangerous for a person in insolvent circumstances to buy and pay for a sack of flour, a flitch of bacon, or a bag of potatoes. To avoid bankruptcy, his family must starve. The soda water and lemonade to the value of 50 cents, with which Beach allays the thirst proper to his clime, were inexpensive refreshments, as innocuous as the "cup which cheers, but not inebriates." More debatable is the effect of coca cola. But his purchase of this mysterious elixir amounted to only 5 cents. The bar of soap, worth five cents, is without the pale of judicial discussion. It is true that there was a dressed doll, the price of which was more extravagant. This was $2.15. Beach testifies

that it was "for a present." The evidence fails to disclose upon whom this marvel of art and fashionable millinery was bestowed. It, however, appears that Beach is a bachelor—an "old bachelor," we may presume—and perhaps the "dressed doll" made happy the heart of some tiny maiden, whose lovely face and graceful form brought back to the veteran and hapless heart of the alleged bankrupt the memory of features which "love used to wear," in the words of Ossian, "sweet and sad to the soul, like the memory of joys that are gone."

We conclude, therefore, that the payment of 60 cents for soda water, coca cola, and one bar of soap, and $2.15 for a dressed doll, in the absence of all other evidence to that end, does not raise the presumption of an intent to give to the creditor paid a preference over his other creditors. Since it appears from the record that this is the only transaction upon which bankruptcy is now charged or assigned, the finding of the master on the second alleged ground of bankruptcy, namely, the payment to Keith of $2.75, is overruled.

A decree will be entered accordingly.

(g) Reasonable Cause to Believe that a Preference Would be Effected

In re F. M. & S. Q. CARLILE

199 Fed. 612

(District Court, D. North Carolina. September 30, 1912)

CONNOR, District Judge. The controversy presented by the record relates to the validity of the transfer of certain choses in action made to the receiver of the Bank of Tarboro by the bankrupts within four months prior to the institution of proceedings in bankruptcy, to secure an overdraft due the bank.

* * *

Proceeding, therefore, to a disposition of the case as disclosed by the transcript, I note that the referee bases his conclusion upon the language of § 60*a*, quoting it in his opinion. The solution of the question presented by the contention made by the trustee is dependent upon the construction of § 60*b*. A preference under § 60*a* is not voidable, nor does it, under § 57*g*, as amended by the act of 1903, prevent the preferred creditor from proving his claim for any balance remaining due after exhausting the property transferred. It will be noted that § 57*g*, as originally en-

acted, precluded a creditor, who had received a preference as defined by § 60*a*, from proving his debt until he had surrendered the property transferred. Subsequent to, and by reason of, the decision in Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. ed. 1171, Congress amended § 57*g*, so that only a preference as defined by § 60*b* prevented the creditor from proving the balance of his debt without surrendering his preference.

At no time did the Bankrupt Act of 1898 give to the trustee the right to recover property transferred within four months prior to proceedings in bankruptcy, unless the elements prescribed by § 60*b* were shown to exist. A preference, as defined by § 60*a*, is without any effect upon the right of the creditor, since the amendment of 1903 to § 57*g*. It would be a strange conclusion that a simple preference under § 60*a* entitled the trustee to recover the property transferred, when, under § 57*g*, as amended, he can prove his debt without surrendering the preference.

We are thus brought to inquire whether, under the provisions of § 60*b*, the testimony before the referee entitles the trustee to recover the property transferred by the bankrupt on August 11, 1911; that is, does the testimony establish the allegation that the transfer constituted a voidable preference? § 60*b* defines such a preference, so far as applicable to this case, as (1) a transfer of property, (2) within four months before the filing of the petition in bankruptcy, (3) by a person who is insolvent, (4) when the person to whom the transfer is made shall then have reasonable cause to believe that the enforcement of such transfer will effect a preference. When these essential elements are found in a transaction between a bankrupt and his creditor, it is provided that—

"it shall be voidable by the trustee and he may recover the property or its value."

For the definition of the word "preference," as used in § 60*b*, recourse must be had to § 60*a*. We there find that, in order that a transfer, etc., shall operate as a preference, within the meaning of the act, it must—

"enable the creditor, to whom the transfer is made, to obtain a greater percentage of his debt than any other such creditors of the same class."

Thus it is seen that § 60*a* defines a "preference," § 60*b* a "voidable preference," § 67*c* a "fraudulent preference," under the Bankrupt Act, and § 70*e* a "transfer of property," fraudu-

lent under the state law. For the definition of a preference, which is declared to be an act of bankruptcy, see § 3. Without question, the evidence before the referee establishes a preference within the terms of § 60*a*, leaving in controversy the sole question whether it brings such preference within the terms of § 60*b*.

The burden of proof is upon the trustee. Loveland on Bankruptcy (4th ed.) § 544; Barbour v. Priest, 103 U. S. 293, 26 L. ed. 478. Judge Sanford in Kimmerle v. Farr, 189 Fed. 295, 111 C. C. A. 27 (Sixth Circuit), says that the burden of proof is on the trustee in bankruptcy, seeking to avoid as a preference a transfer of property made by a bankrupt, to prove by sufficient evidence all of the essential elements of a voidable preference. The question discussed in that case, whether it is essential to show that the creditor knew of the debtor's intention to create a preference, is eliminated by the amendment of 1910; the words inserted in § 60*b* by the amendment of 1903, "had reasonable cause to believe that it was intended thereby to give a preference," being stricken out. Loveland on Bankruptcy (4th ed.) § 492.

Did Pennington, or his attorney, who drew and took the transfer, have reasonable cause to believe that the effect of the transfer would be to give a preference, as defined by § 60*a*? F. M. Carlile was the only witness examined before the referee. He says that, when Pennington was appointed receiver of the Bank of Tarboro, in June, 1911, the firm of F. M. & S. Q. Carlile was overdrawn $1,263.78; that they owed the bank $700 by note, and another note of $1,000 secured by mortgage on real estate; that they executed the transfer to Pennington in the office of Mr. Gilliam, one of his attorneys, for notes and accounts amounting to about $1,050, and a promise to deliver in ten days thereafter $300 more; that at the time he executed the transfer he thought his firm was entirely solvent, and so represented to Mr. Gilliam; that he stated to Mr. Gilliam that they had $1,000 solvent accounts, $570 notes secured by mortgages, $1,700 cash account (about), $5,000 stock (about), $800 hearse and wagon (about), and at the same time represented that the liabilities of said firm, other than its indebtedness to the Bank of Tarboro, did not exceed $3,000; that at that time he had no idea that the firm would go into bankruptcy within four months from said date; that he assured Mr. Gilliam that, by giving them the extension, they would be able to liquidate all of the firm's obligations; that Mr. Pennington asked him about securing the

overdraft—said he would grant the extension if the collaterals were put up. This is all that was said about it. He did not say that if they were not put up he would "push them for it." Their purpose in making the transfer was not to give the bank a preference, but to secure the overdraft. There is no evidence that Pennington had any information in regard to the financial condition of Carlile.

The only other evidence introduced was the schedule, filed by the bankrupts, October 14, 1911, from which it appears that they owed debts, secured, $5,305 (it appears that the property mortgaged was of sufficient value to pay these debts), and $5,627.04 unsecured debts. The schedules show stock valued at $4,000, notes secured by title retained to furniture purchased $1,300, notes for pianos, title retained, $670, hearse and wagon $515, and debts due on open accounts $1,500. It does not appear that either Mr. Pennington or Mr. Gilliam had any knowledge of, or information in regard to, the indebtedness of the firm, other than that due the bank, or any other knowledge or information in regard to the character, etc., of the property other than that given by bankrupts. Certainly, if they were justified in accepting that information—that is, if they had no good and sufficient reason to doubt the truth of it—there was nothing in the statement calculated to create a reasonable belief that the firm was insolvent; that is, that the bankrupts were making false statements, and that, in accepting the transfer, they were receiving a preference.

The referee finds, I presume, from the account of the trustee, that he has not, after diligent effort, been able to realize more than $3,624 cash from the property. This finding, however, is of little probative value in ascertaining what information Mr. Pennington or his attorney had on the subject on August 11, 1911. There is no evidence in the record in respect to the moral character of the bankrupts, the manner in which they had been conducting business, or their commercial credit. Nor is there any evidence in regard to the extent or character of their dealings with the bank—whether their account was frequently overdrawn, or how long the overdraft had existed. There is nothing to indicate that the receiver had been, prior to his appointment, connected with the bank, or was acquainted with the relations existing between the bank and the bankrupts. It does not appear that the receiver did anything more than a prudent and faithful discharge of his duty demanded. While the overdraft was large for men of their worth, we may take notice of the fact that, for

some reason, the bank went into the hands of the receiver in midsummer, at a season when, in this section, cash business is dull and money scarce. While prudent banking would suggest that customers be called upon to either cover the overdraft or give security, yet the mere fact that a customer of a bank, carrying a stock of $4,000, etc., has overdrawn for $1,263, would not, of itself, be calculated to create a reasonable apprehension of insolvency.

The correct rule is well stated by Mr. Justice Bradley in Grant v. National Bank, 97 U. S. 80, 24 L. ed. 971, in which he says:

"Some confusion exists in the cases as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assumes that it has the same meaning as if it had read 'having reasonable cause to suspect such person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debts. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. * * * The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is, in fact, desperate, and his creditors, if they knew anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice."

In the language of Mr. Justice Bradley in the opinion cited, the evidence before the referee falls far short of establishing that the receiver had reasonable cause to believe that Carlile was in-

solvent at the time the transfer was executed. Mr. Collier, in his excellent work on Bankruptcy, at p. 669, says:

"It has been held that it is not necessary for a creditor to know, or have reasonable cause to believe, that the debtor is insolvent when a mortgage or pledge is made within the four months period to secure an antecedent debt."

In support of this guarded statement the author cites In re Mills (D. C.) 162 Fed. 42, 20 Am. Bankr. Rep. 501. An examination of the "headnote" (No. 4) sustains the statement of Mr. Collier and the referee's conclusion in this case. An examination of the case, as reported, explains how the error found its way into the "headnote." The referee, in an elaborate report, finds as a fact that the creditor had, not only reasonable cause to believe that the debtor was insolvent, but that the officers of the trust company well knew that he was insolvent. On p. 48 of 162 Fed. the referee says:

"The referee further holds that, when a mortgage or pledge is made to secure an antecedent debt, within four months of the filing of petition in bankruptcy against him, it is not necessary that the creditor should have reasonable cause to believe that the debtor was then insolvent; a different rule applying to such a case from that which governs when there is an absolute payment of a pre-existing debt"—saying that the law is "directly so held by the Circuit Court of Appeals in this (the Fourth) circuit, in Farmers' Bank v. Carr, 127 Fed. 690 [62 C. C. A. 446]."

An examination of the case does not sustain the construction put upon it. It does not very clearly appear from the report how the question arose, but it is manifest, from Judge Simonton's opinion, that the conclusion reached by the court was based upon the fact that the preferred creditor had notice of such facts as should have created a reasonable belief of the debtor's insolvency. It will be found that the cases cited by the referee (McNair v. McIntyre, 113 Fed. 113, 51 C. C. A. 89; In re Hill [D. C.] 140 Fed. 984; In re Pease [D. C.] 129 Fed. 446) do not sustain his conclusion. So much of the report (p. 48) as discusses this question is entirely unnecessary and surplusage, because he had found the fact of actual notice of insolvency upon which the ultimate conclusion was based. It will be noted that, when the report came before Judge Purnell, District Judge, he wrote no opinion, simply stating that "the findings of fact are supported by ample proof" and "are in all respects confirmed."

It is true that he also says that the conclusions of law are also confirmed; but a reasonable construction of the last words used by the judge restricts the conclusion of law to such as are applicable to the findings of fact. The case, as thus explained, is in harmony with the uniform current of authority and the manifest meaning of the statute.

I have deemed it proper to make this reference to the error into which one, following the "headnote" and the language of the referee in that case, may be led because of the fact that the case is from this district. In view of the fact that the parties have submitted to the jurisdiction, and by their actions waived all questions of regularity of procedure, I have discussed and decided the questions presented, thus saving time and expense in the final settlement of the estate. The error into which the referee fell is the result of supposing that the case was governed by § 60*a*, instead of § 60*b*. He does not find, because in his view of the law it was not material to inquire, whether the receiver or his attorney had a reasonable ground to believe that Carlile was insolvent. I am of the opinion that he was correct in finding that the transfer operated as a preference as defined by § 60*a*, but was in error in holding that this entitled the trustee to recover the property. I am further of the opinion that the evidence does not establish a voidable preference within the definition of § 60*b*. There is no suggestion that the transfer was void under § 67*e*. The trustee, therefore, is not entitled to recover the property in controversy.

The order of the referee is reversed.

HEWITT v. BOSTON STRAW BOARD CO.

214 Mass. 260, 101 N. E. 424

(Supreme Judicial Court of Massachusetts. April 1, 1913)

Contract by the trustee in bankruptcy of the Corperdix Paper Tube Company, a corporation, for the amount of a preference alleged to have been paid to the defendant by the bankrupt.

* * *

BRALEY, J. It having appeared that at a fair valuation the bankrupt's property at the date of transfer was insufficient in amount to pay its debts, the judge was warranted in finding it to have been insolvent as defined by the act itself. Act 1898,

c. 541, § 1, subsec. 15; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 532, 27 Sup. Ct. 391, 51 L. ed. 596. See Bailey v. Wood, 211 Mass. 37, 44, 45, 97 N. E. 902, Ann. Cas. 1913A, 950. But even if the corporation was insolvent, the plaintiff must show that "the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference. * * *" Act 1898, c. 541, § 60*b*, as amended by Act 1910, c. 412, § 11; Kaufman v. Tredway, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. ed. 190; Beals v. Quinn, 101 Mass. 262; Otis v. Hadley, 112 Mass. 100. The bankrupt's property had been attached by the defendant to enforce payment of an antecedent unsecured indebtedness for goods sold and delivered, and after effecting a sale of nearly one-half of the manufacturing plant, the bankrupt transferred within four months prior to the date of adjudication, and in part satisfaction of the debt, three promissory notes received in part payment from the purchaser.

Where there is reasonable cause to believe, that at the date of transfer within the statutory period the debtor is insolvent, and payment is accepted of a debt overdue, it is immaterial whether the creditor actually believes what may have been disclosed as to the true state of affairs. If he prefers to draw inferences favorable to himself, and to ignore information which would have led to knowledge that his debtor was in failing circumstances, he cannot set up his own judgment to the contrary even if honestly entertained, as a reason why he should be permitted to retain a prohibited advantage. Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475; Whipple v. Bond, 164 Mass. 182, 41 N. E. 203; In re George, 1 Lowell, 409, 411, Fed. Cas. No. 5,325; Toof v. Martin, 13 Wall. 40, 20 L. ed. 481.

By the express words of the amendatory act, which are merely declaratory of the rule of law, that knowledge possessed by an agent may be imputed to his principal, the defendant is bound by the information acquired by its attorney who made the attachment and acted for it in effecting the settlement. Rogers v. Palmer, 102 U. S. 263, 26 L. ed. 164; Sartwell v. North, 144 Mass. 188, 10 N. E. 824. The judge from the statements of the bankrupt's officers well might find that the defendant's attorney upon being fully informed as to the impaired resources of the bankrupt company, and understanding the object as well as the legal

effect of the transfer, expressed himself as willing to take the hazard of a recovery back by the trustee, if bankruptcy intervened. The bankrupt and the defendant must be presumed to have known that what had been done resulted in a preference, even if the form of transfer consisted of securities received by the bankrupt from a third party. Sawyer v. Turpin, 2 Lowell, 29, Fed. Cas. No. 12,410; Western Tie & Lumber Co. v. Brown, 196 U. S. 502, 509, 25 Sup. Ct. 339, 49 L. ed. 571; Dickinson v. National Security Bank of Richmond, 110 Fed. 353, 49 C. C. A. 84; Bankr. Act 1898, c. 541, § 60, subsecs. "a" and "b," as amended by Act 1903, c. 487, § 13, and Act 1910, c. 412, § 11.

It is maintained, however, that the evidence does not disclose the class of creditors to which the defendant belonged, and there is no preference, because it cannot be determined whether a greater percentage of its debt had been obtained than the amount which other creditors of the same class would receive. Act 1898, c. 541, § 60, subsec. "a." The defendant at the date of the transaction ranked with the class of unsecured creditors shown by the list of accounts payable, which apparently were provable debts. It is not even suggested that they could have been paid in full by the bankrupt, although entitled to share equally with the defendant in the distribution of its property. Nor is it contended that the trustee has received sufficient assets to enable him to satisfy fully the claims which have been allowed. Kimball v. Dresser, 98 Me. 519, 57 Atl. 787. A transfer of the character shown materially diminished the bankrupt's estate. If allowed to stand it would defeat the purpose of the Bankruptcy Act, which, after priorities are satisfied, is the distribution of the bankrupt's property equally among all his creditors, whether secured or unsecured. Act 1898, c. 541, §§ 63, 64, 67 and the several subsections; In re Hapgood, 2 Lowell, 200, Fed. Cas. No. 6,044; Swarts v. Fourth Nat. Bank of St. Louis, 117 Fed. 1, 54 C. C. A. 387; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 479, 104 N. W. 98, 115 Am. St. Rep. 955; Nat. Bank of Newport v. Nat. Herkimer County Bank, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. ed. 1042.

The plaintiff accordingly can recover the amount of the notes with interest from the date of the preferential payment. Clarion First Nat. Bank v. Jones, 21 Wall. 325, 22 L. ed. 542.

Exceptions overruled.

(h) Surrender of Preference

KEPPEL v. TIFFIN SAVINGS BANK

197 U. S. 356, 49 L. ed. 790, 25 Sup. Ct. 443

(United States Supreme Court. April 3, 1905)

Charles A. Goetz became a voluntary bankrupt on October 12, 1900. George B. Keppel, the trustee, sued the Tiffin Savings Bank in an Ohio court to cancel two real-estate mortgages executed by Goetz, one to secure a note for $4,000 and the other a note for $2,000. The mortgage to secure the $4,000 note was made more than four months before the adjudication in bankruptcy. The mortgage securing the $2,000 note was executed a few days before the bankruptcy, the mortgagor being at the time insolvent and intending to prefer the bank. The bank defended the suit, averring its good faith and asserting the validity of both the securities. In a cross petition the enforcement of both mortgages was prayed. The court held the mortgage securing the $4,000 note to be valid, and the mortgage securing the $2,000 note to be void. The trustee appealed to a circuit court, where a trial *de novo* was had. At such trial the attorney for the bank stated to the court that the bank waived any claim to a preference as to the $2,000 note, but that he could not assent to a judgment to that effect. A judgment was entered sustaining the security for the $4,000 note and avoiding that for the $2,000 note.

The bank subsequently sought to prove that it was a creditor of the estate upon the note for $2,000, and upon two other unsecured notes, aggregating $835. The referee refused to allow the proof, upon the ground that, as the bank had compelled the trustee to sue to cancel the security, and a judgment nullifying it had been obtained, the bank had lost the right to prove any claim against the estate. The district judge, upon review, reversed this ruling. The Circuit Court of Appeals to which the issue was taken, after stating the case as above recited, certified questions for our determination.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the court:

The following are the questions asked by the Court of Appeals:

"First. Can a creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained

such preference until deprived thereof by the judgment of a court upon a suit of the trustee, thereafter prove the debt so voidably preferred?

"Second. Upon the issue as to the allowance of the bank's claims, was it competent, in explanation of the judgment of the Ohio Circuit Court in favor of the trustee and against the bank in respect to its $2,000 mortgage, to show the disclaimer made in open court by the attorney representing the bank, of any claim of preference, and the grounds upon which the bank declined to consent to a judgment in favor of the trustee?

"Third. If the failure to 'voluntarily' surrender the mortgage given to secure the $2,000 note operates to prevent the allowance of that note, does the penalty extend to and require the disallowance of both the other claims?"

Before we develop the legal principles to the solution of the first question, it is to be observed that the facts stated in the certificate and implied by the question show that the bank acted in good faith when it accepted the mortgage and when it subsequently insisted that the trustee should prove the existence of the facts which, it was charged, vitiated the security. It results that the voidable nature of the transaction alone arose from § 67*e* of the act of 1898, invalidating "conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate" [30 Stat. at L. 565, c. 541, U. S. Comp. Stat. 1901, p. 3449], and giving the assignee a right to reclaim and recover the property for the creditors of the bankrupt estate.

On the one hand, it is insisted that a creditor who has not surrendered a preference until compelled to do so by the decree of a court cannot be allowed to prove any claim against the estate. On the other hand, it is urged that no such penalty is imposed by the bankrupt act, and hence the creditor, on an extinguishment of a preference, by whatever means, may prove his claims. These contentions must be determined by the text, originally considered, of § 57*g* of the bankrupt act, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." We say by the text in question, because there is nowhere any prohibition against the proof of a claim by a creditor

who has had a preference, where the preference has disappeared as the result of a decree adjudging the preferences to be void, unless that result arises from the provision in question. We say also from the text as originally considered, because, although there are some decisions, under the act of 1898, of lower Federal courts, which are referred to in the margin,[42] denying the right of a creditor to prove his claim, after the surrender of a preference by the compulsion of a decree or judgment, such decisions rest not upon an analysis of the text of the act of 1898 alone considered, but upon what were deemed to have been analogous provisions of the act of 1867 and decisions thereunder. We omit, therefore, further reference to these decisions, as we shall hereafter come to consider the text of the present act by the light thrown upon it by the act of 1867 and the judicial interpretation which was given to that act.

The text is, that preferred creditors shall not prove their claims unless they surrender their preferences. Let us first consider the meaning of this provision, guided by the cardinal rule which requires that it should, if possible, be given a meaning in accord with the general purpose which the statute was intended to accomplish.

We think it clear that the fundamental purpose of the provision in question was to secure an equality of distribution of the assets of a bankrupt estate. This must be the case, since, if a creditor having a preference retained the preference, and at the same time proved his debt and participated in the distribution of the estate, an advantage would be secured not contemplated by the law. Equality of distribution being the purpose intended to be effected by the provision, to interpret it as forbidding a creditor from proving his claim after a surrender of his preference, because such surrender was not voluntary, would frustrate the object of the provision, since it would give the bankrupt estate the benefit of the surrender or cancellation of the preference, and yet deprive the creditor of any right to participate, thus creating an inequality. But it is said, although this be true, as the statute is plain, its terms cannot be disregarded by allowing that to be done which it expressly forbids. This rests upon the assumption that the word "surrender" necessarily

42—Re Greth, 112 Fed. 978; Re Keller, 109 Fed. 118, 126, 127; Re Ownings, 109 Fed. 623.

implies only voluntary action, and hence excludes the right to prove where the surrender is the result of a recovery compelled by judgment or decree.

The word "surrender," however, does not exclude compelled action, but, to the contrary, generally implies such action. That this is the primary and commonly accepted meaning of the word is shown by the dictionaries. Thus, the Standard Dictionary defines its meaning as follows: "1. To yield possession of to another upon compulsion or demand, or under pressure of a superior force; give up, especially to an enemy in warfare; as, to *surrender* an army or a fort." And in Webster's International Dictionary the word is primarily defined in the same way. The word, of course, also sometimes denotes voluntary action. In the statute, however, it is unqualified, and generic, and hence embraces both meanings. The construction which would exclude the primary meaning, so as to cause the word only to embrace voluntary action, would read into the statute a qualification, and this in order to cause the provision to be in conflict with the purpose which it was intended to accomplish,—equity among creditors. But the construction would do more. It would exclude the natural meaning of the word used in the statute, in order to create a penalty, although nowhere expressly or even by clear implication found in the statute. This would disregard the elementary rule that a penalty is not to be readily implied, and, on the contrary, that a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it. Tiffany v. National Bank, 18 Wall. 409, 410, 21 L. ed. 862, 863. If it had been contemplated that the word "surrender" should entail upon every creditor the loss of power to prove his claims if he submitted his right to retain an asserted preference to the courts for decision, such purpose could have found ready expression by qualifying the word "surrender" so as to plainly convey such meaning. Indeed, the construction which would read in the qualification would not only create a penalty alone by judicial action, but would necessitate judicial legislation in order to define what character and degree of compulsion was essential to prevent the surrender in fact from being a surrender within the meaning of the section.

It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt, and thus suffer no other

loss than the costs of litigation. The fallacy lies in assuming that the courts have power to inflict penalties, although the law has not imposed them. Moreover, if the statute be interpreted as it is insisted it should be, there would be no distinction between honest and fraudulent creditors, and therefore every creditor who in good faith had acquired an advantage which the law did not permit him to retain would be subjected to the forfeiture simply because he had presumed to submit his legal rights to a court for determination. And this accentuates the error in the construction, since the elementary principle is that courts are created to pass upon the rights of parties, and that it is the privilege of the citizen to submit his claims to the judicial tribunals,—especially in the absence of malice and when acting with probable cause,—without subjecting himself to penalties of an extraordinary character. The violation of this rule, which would arise from the construction, is well illustrated by this case. Here, as we have seen, it is found that the bank acted in good faith, without knowledge of the insolvency of its debtor and of wrongful intent on his part, and yet it is asserted that the right to prove its lawful claims against the bankrupt estate was forfeited simply because of the election to put the trustee to proof, in a court, of the existence of the facts made essential by the law to an invalidation of the preference.

We are of opinion that, originally considered, the surrender clause of the statute was intended simply to prevent a creditor from creating inequality in the distribution of the assets of the estate by retaining a preference, and at the same time collecting dividends from the estate by the proof of his claim against it, and consequently that whenever the preference has been abandoned or yielded up, and thereby the danger of inequality has been prevented, such creditor is entitled to stand on an equal footing with other creditors and prove his claims.

Is the contention well founded that this meaning which we deduce from the text of the surrender clause of the present act is so in conflict with the rule generally applied in bankruptcy acts, and is, especially, so contrary to the act of 1867 and the construction given to it, that such meaning cannot be considered to have been contemplated by Congress in adopting the present act, and hence a contrary interpretation should be applied?

* * *

It follows that the construction which we at the outset gave to the text of the act of 1898, instead of being weakened, is abso-

lutely sustained by a consideration of the act of 1867, both before and after the amendment of 1874, and the decisions construing the same, since in the present act, as we have said, there is nowhere found any provision imposing even the modified penalty which was expressed in the amendment of 1874. The contention that, because the act of 1898 contains a surrender clause, therefore it must be assumed that Congress intended to inflict the penalty originally imposed by § 39 of the act of 1867, must rest upon the erroneous assumption that that penalty was the result of the surrender clause alone. But this, as we have seen, is a misconception, since from the great weight of judicial authority under the act of 1867, as well as by the express enactment of Congress in the amendment of 1874 and the decisions which construed that amendment, it necessarily results that the penalty enforced under the act of 1867 arose not from the surrender clause standing alone, but solely from the operation upon that clause of the express prohibition contained in § 39 of that act. When, therefore, Congress in adopting the present act omitted to re-enact the provision of the act of 1867, from which alone the penalty or forfeiture arose, it cannot in reason be said that the omission to impose the penalty gives rise to the implication that it was the intention of Congress to re-enact it. In other words, it cannot be declared that a penalty is to be enforced because the statute does not impose it.

And, irrespective of this irresistible implication, a general consideration of the present act persuasively points out the purpose contemplated by Congress in refraining from re-enacting the penalty contained in § 39 of the act of 1867. Undoubtedly the preference clauses of the present act, differing in that respect from the act of 1867, as is well illustrated by the facts of this case, include preferences where the creditor receiving the same acted without knowledge of any wrongful intent on the part of the debtor, and in the utmost good faith. Pirie v. Chicago Title & T. Co., 182 U. S. 454, 45 L. ed. 1179, 21 Sup. Ct. Rep. 906. Having thus broadened the preference clauses so as to make them include acts never before declared by Congress to be illegal, it may well be presumed that Congress, when it enacted the surrender clause in the present act, could not have contemplated that that clause should be construed as inflicting a penalty upon creditors coming within the scope of the enlarged preference clauses of the act of 1898, thereby entailing an unjust and unprecedented result.

Our conclusion, therefore, is that the first question propounded must be answered in the affirmative, and that the two other questions require no response.

And it is ordered accordingly.[43]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS

WEST CO. v. LEA

174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. 836

[See this case given *ante,* p. 104]

MISSOURI-AMERICAN ELECTRIC CO. v. HAMILTON-BROWN SHOE CO.

165 Fed. 283, 91 C. C. A. 251

(Circuit Court of Appeals, Eighth Circuit. November 16, 1908)

SANBORN, Circuit Judge. This is an appeal from an adjudication in bankruptcy of the Missouri-American Electric Company, a corporation of the state of Missouri, upon a creditors' petition filed February 16, 1907, upon the grounds (1) that on October 7, 1906, the corporation, while insolvent, made a general assignment of all its property to the American Electric Company, a corporation of the state of New Jersey, and (2) that on October 17, 1906, the Missouri Company, while insolvent, paid to the American Company, one of its creditors, $18,000, with intent to prefer the latter to its other creditors, and that the latter company at that time had reasonable cause to believe that it was intended to give it a preference over other creditors similarly situated by this payment. There was no evidence of any payment of $18,000 or any like sum to the American Company within four months of the filing of the petition, except the transfer of the money and property which was subject to the written instruments executed on October 17, 1906, which the appellees insist constitute a general assignment for the benefit of the creditors of the Missouri Company under § 3*a*(4) of the bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]). The decision of the merits of the case turns upon the legal effect of those writings. The charges of the com-

43—The dissenting opinion of Mr. Justice DAY is omitted. Mr. Justice HARLAN, Mr. Justice BREWER, and Mr. Justice BROWN concurred in the dissent.

mission of the acts of bankruptcy were denied by the Missouri Company, the issues were tried by the District Court, evidence which fills more than 200 pages of the printed transcript was adduced, the court closed the hearing while the Missouri Company was still introducing its evidence in defense and before it had rested, that company excepted to this premature closing of the case, and the court rendered a decree adjudging it a bankrupt. * * *

Was the assignment of October 17, 1906, a general assignment for the benefit of the creditors of the Missouri Company within the meaning of § 3*a*(4) of the bankruptcy act of 1898 and hence an act of bankruptcy? A general assignment conveys all or substantially all the property of the debtor, while an assignment which conveys but a portion of it is a partial assignment, and not a general assignment. United States v. Hooe, 3 Cranch, 73, 90, 2 L. ed. 370; Bock v. Perkins, 139 U. S. 628, 641, 11 Sup. Ct. 677, 35 L. ed. 314; United States v. Howland, 4 Wheat. 108, 114, 4 L. ed. 526; United States v. Langton, 26 Fed. Cas. 862, 864, No. 15,560; United States v. Clark, 25 Fed. Cas. 447, 451, No. 14,807; Mussey v. Noyes, 26 Vt. 462, 474, 475. This assignment did not convey the real estate of the assignor, which was about one-fourth of its property in value after the amount of the incumbrance upon the real estate had been deducted from its total value. It is true that the assignment transferred the proceeds of any sale of this real estate that had been made, or that should be made, but none had been made, and the Missouri Company retained the absolute possession, use, control, and power of disposition of it. Notwithstanding the assignment the assignor retained the right and the power to use, to rent, and never to sell the real estate. An absolute transfer by a debtor of both the legal and the equitable titles to the assignee in trust for his creditors, so that the grantor retains no control of its use and no power to dispose of it, is indispensable to a valid assignment of such property for the benefit of creditors. Sandmeyer v. Dakota Fire & Marine Ins. Co., 2 S. D. 346, 352, 50 N. W. 353, and cases there cited; Smith & Keating Imp. Co. v. Thurman, 29 Mo. App. 186, 191. The conveyance here in question made no such transfer of the real estate of the debtor.

A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration from the grantee of substantially all his property to a party in trust to collect the amounts owing to him, to sell and convey the property, to dis-

tribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor. A conveyance of his property by a debtor directly to his creditor, or to his creditors, for their benefit, is not a general assignment for the benefit of creditors because it raises no trust. Mussey v. Noyes, 26 Vt. 462, 474, 475; Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C.), 125 Fed. 974. This conveyance is an assignment by a debtor to its largest creditor in payment of the latter's debt of a part of the debtor's property in consideration of the release of its debt by this creditor and of the latter's agreement to pay all other creditors of the grantor out of the proceeds of the property assigned. The apparent purpose and effect of it is a sale of the remainder of the part of the debtor's property described in the assignment after all its other debts have been paid out of it to the debtor's chief creditor in consideration of the latter's release and discharge of its claim against the debtor. The controlling rule for the interpretation of written instruments is that the intention of the parties should be adduced from them and given effect. Bock v. Perkins, 139 U. S. 628, 635, 11 Sup. Ct. 677, 35 L. ed. 314. In the courts of the state of Missouri, of the state under whose laws the grantor in this conveyance was organized and in which its real estate and its place of business were situated, it is an established rule of construction that no instrument shall be held to constitute an assignment for the benefit of creditors unless it clearly appears either that the grantor intended that it should so operate or that such was its necessary legal effect. Dry Goods Co. v. Grocer Co., 68 Mo. App. 290, 295; Haase v. Distilling Co., 64 Mo. App. 131, 135; Hargadine v. Henderson, 97 Mo. 375, 387, 11 S. W. 218; Jaffrey v. Mathews, 120 Mo. 317, 328, 25 S. W. 187; Brookshier v. Mutual Fire Ins. Co., 91 Mo. App. 599, 605.

In Becker v. Rardin, 107 Mo. 111, 117, 17 S. W. 892, a debtor had conveyed to one of his creditors his stock of goods, the creditor had satisfied his claim, and had agreed to pay the claims of certain other creditors in consideration of that conveyance. The parties further agreed in the instrument of conveyance that the goods should be invoiced, a part at first cost and a part at their then cash value, that, if the invoice value proved to be less than the aggregate amount agreed to be paid by the grantee to the creditors named therein the debtor would assign accounts receivable sufficient in amount to make up that aggregate, and that if the invoice value should prove to be more than that aggre-

gate, then the balance above that amount should be paid to a third party for the benefit of other parties not named in the instrument. The Supreme Court of Missouri held that the conveyance did not constitute a voluntary assignment for the benefit of creditors.

Because the assignment of October 17, 1906, did not convey substantially all but only a portion of the property of the Missouri Company, because it did not transfer the title to its real estate to the assignee, but left the real estate, its use, control, and power of disposition in the grantor, because it was the intention of the grantor when it made the instrument to sell the remainder of a part of its property after its other debts had been paid out of the proceeds of that part to its chief creditor in consideration of a discharge of its obligation to it, and it was not its purpose, nor was it the legal effect of the assignment of October 17, 1906, to make a general assignment of the property of the debtor for the benefit of its creditors, our conclusion is that that instrument was not such an assignment and its execution was not an act of bankruptcy. The result is that the creditors failed to establish the averments of acts of bankruptcy contained in their petition, and the adjudication in bankruptcy must be reversed, and the case must be remanded to the court below with directions to dismiss the petition.

It is so ordered.[44]

COURTENAY MERCANTILE CO. v. FINCH

194 Fed. 368, 114 C. C. A. 328

(Circuit Court of Appeals, Eighth Circuit. March 7, 1912)

WM. H. MUNGER, D. J. The Courtenay Mercantile Company, a corporation, becoming insolvent in November, 1910, executed and delivered the following instrument:

"Minneapolis, Minn., March 3, 1911.

"Assignment, Courtenay Mercantile Co. to P. S. Preston.

"This agreement, made this 10th day of November, 1910, by and between Courtenay Mercantile Company, a corporation, of Courtenay, in the county of Stutsman, state of North Dakota, party of the first part, and Percival S. Preston, of the city of Minneapolis, county of Hennepin, and state of Minnesota, party

44—See In re Heleker Bros. Mercantile Co., 216 Fed. 963.

of the second part, witnesseth: That the party of the first part, in consideration of the premises and the mutual promises herein contained and the sum of one dollar to it in hand paid by the party of the second part, has granted, bargained, sold, conveyed, and assigned, and by these presents does bargain, grant, sell, convey, and assign, unto said party of the second part, his successors and assigns, forever, all and singular its stock of goods, wares, and merchandise, book accounts, notes and all claims demands, and choses in action, with all evidences thereof and securities thereto pertaining, and all its lands, tenements, and hereditaments, wherever situate, to have and to hold the same unto the said party of the second part, his successors and assigns, forever, in trust, nevertheless, for the uses and purposes following, which the second party agrees to fulfill, to wit:

"(1) To take possession of said property, and to sell and dispose of same at public or private sale, with all reasonable diligence, and to convert the same into money; also to collect all claims, demands, and bills receivable hereby assigned, or to settle, compromise, and compound any thereof that are doubtful, or to sell and dispose of the same and reduce them to money as soon as may be, and with and out of the proceeds of such sales and collections:

"(2) To pay and discharge all the just and reasonable expenses, costs, and charges of executing and carrying into effect the trust hereby created, including reasonable compensation to the party of the second part for his services and expenses paid or incurred (including counsel fees) in executing the same.

"(3) To pay and discharge in full, if the residue of such proceeds be sufficient, all the debts and liabilities due or owing by the party of the first part, including interest thereon, to those of his creditors who shall become parties hereto by signing this agreement or copy thereof, and who shall in consideration of the premises undertake and agree, upon payment made, whether in whole or in part, as herein provided, to fully release, discharge, and absolve the party of the first part from and of all indebtedness to them, or either of them, now due or owing.

"And if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend *pro rata* to the payment of said debts and liabilities and interest. And if, after payment as aforesaid, there shall be any surplus, to pay such surplus to the party of the first part, his executors, administrators, or assigns.

The words 'party of the first part' herein shall be construed to mean parties of the first part.

"In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

"Courtenay Mercantile Co.,

"[Corporate Seal.] By J. B. Durkee, President."

This instrument was duly acknowledged and filed for record. Thirty-eight creditors, whose claims aggregated a little over $7,000, accepted the terms of the instrument. Twenty-four creditors, whose claims aggregated a little over $40,000, either refused or failed to signify their acceptance. On the 30th of January, 1911, certain creditors filed a petition in bankruptcy, praying that the said Mercantile Company be adjudged bankrupt, charging as the act of bankruptcy that on the 10th day of November, 1910, it made a general assignment for the benefit of its creditors to one Percival S. Preston, being the instrument heretofore mentioned. The Courtenay Mercantile Company filed its answer to the petition in involuntary bankruptcy, denying that it committed the act of bankruptcy alleged, or that it was insolvent. The case came on for trial, and was heard upon a stipulation as to the facts—the stipulation showing that, by the instrument above mentioned, the Courtenay Mercantile Company conveyed to Preston all of its property of every kind and nature; that the above-mentioned instrument was executed by the Courtenay Mercantile Company and delivered to Preston pursuant to a resolution of the board of directors of the Courtenay Mercantile Company; that Preston accepted the trust, and entered upon the discharge of his duties as trustee. The court held that the foregoing instrument was a general assignment within the meaning of the bankrupt law, and hence an act of bankruptcy, and adjudged the company a bankrupt. The Courtenay Mercantile Company brings the case here on appeal, and the single question is presented as to whether the above agreement was a general assignment within the meaning of the bankrupt law.

It is first to be observed that the instrument conveyed all of the property of the alleged bankrupt to a trustee, who was not a creditor, and for the benefit of creditors. No right of redemption remained, and bankrupt retained no interest, excepting to receive whatever property, if any, should remain after the entire payment of its indebtedness. In re Thomlinson Company, 154 Fed. 834, 83 C. C. A. 550, this court, passing upon the question

as to what was a general assignment within the meaning of the bankrupt law, said:

"'The 'general assignment' there contemplated is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the vendor, share and share alike. Appolos v. Brady, 1 C. C. A. 299, 49 Fed. 401; Bartlett v. Teah (C. C.), 1 Fed. 768; In re Gutwillig (D. C.), 90 Fed. 475; Id., 34 C. C. A. 377, 92 Fed. 337; In re Sievers (D. C.), 91 Fed. 366; Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325. Such a conveyance inevitably thwarts operation of the bankruptcy act. * * * The instrument in question does not contain any of the elements of a mortgage, as insisted upon by bankrupt's counsel. The idea that it was intended as a security for the ultimate payment of the debts of the vendor, or that a reservation of a right to redeem whenever the vendor shall pay its debts was intended, is not remotely suggested by any of the terms of the instrument; in other words, there is no right of redemption reserved. The provision at the end of the instrument, requiring a surplus, if any, to be paid to the vendor, cannot be regarded as such reservation. It is nothing more than an expression of what the law implies. If, after all the property had been disposed of, and all the creditors had been fully paid, and all the expenses satisfied, any surplus remained, it belonged as a matter of law to the debtor, and no formal statement to that effect can change the legal and obvious import of the instrument from a general assignment for the payment of debts to a provision for their security in the nature of a chattel mortgage.''

The rule thus announced is entirely applicable to the instrument executed by the Courtenay Mercantile Company; the only difference between the two being that, in the instrument of the Courtenay Mercantile Company, there was a provision that the proceeds should be distributed among the creditors who accepted the terms of the instrument. This certainly did not change its character. So far as the Courtenay Mercantile Company was concerned, they conveyed all their property to the trustee for the benefit of their creditors, and the instrument speaks of the date of its execution and delivery. It could not be known at that time but that all of the creditors would accept its provisions. Had all the creditors accepted, it certainly would have operated as a general assignment. We do not think that the question as to whether an instrument of that character constitutes a general

assignment or a mortgage is dependent upon the subsequent event of its acceptance by each and all of the debtor's creditors. In Griffin v. Dutton, 165 Fed. 626, 91 C. C. A. 614, the Court of Appeals of the First Circuit, said:

"Nor is it necessary that the assignment should be valid for all purposes; as, for instance, that the creditors should assent thereto. The language of the bankruptcy act is general. It makes no distinction between strictly valid instruments and those which may be invalid for certain purposes. To limit its operation to those assignments which are in all respects valid would be contrary to the intent and purpose of the act."

To the same effect, see In re Meyer, 98 Fed. 976, 39 C. C. A. 368.

It is established by the foregoing authorities that a general assignment for the benefit of creditors, within the inhibition of the bankrupt law, need not necessarily be one which is valid according to the state law. If its legal effect is a transfer of all the debtor's property to a trustee for the benefit of all creditors, share and share alike, who shall come in and prove their claims, and thus accept its terms, it constitutes a general assignment.

We are cited to the case of Joas v. Jordan, 21 S. D. 379, 113 N. W. 73, where the Supreme Court of South Dakota, construing a similar instrument, held that it was not an assignment, but a mere security, as it was for the benefit only of those creditors who assented to its conditions. The court in that case was construing an instrument with reference to the statutory laws of that state, and was not dealing with the question of an assignment under the bankrupt law. Our attention has not been called to any case by the Supreme Court of North Dakota holding that such an instrument is a security in the nature of a chattel mortgage.

We are clearly of the opinion that the instrument in question was a general assignment for the benefit of creditors, within the purview of the bankrupt law, and the decree is affirmed.

4. APPOINTMENT OF A RECEIVER

IN RE SPALDING

139 Fed. 244, 71 C. C. A. 370

(Circuit Court of Appeals, Second Circuit. June 10, 1905)

WALLACE, C. J. This is an appeal from an adjudication of bankruptcy, and is brought by a creditor who interposed an an-

swer to the petition and contested the proceeding and by the executor of Spalding. The acts of bankruptcy upon which the adjudication was based were the appointment and putting in charge of a receiver of the property of the alleged bankrupt by the Supreme Court of the state of New York. The petition for the adjudication alleged the commission of several other acts of bankruptcy of Spalding, but none of the averments in respect thereto were sufficient in form and substance. The referee in bankruptcy by whom the proceeding was heard found that they had not been proved. His findings in this respect were not overruled by the District Court, and we have not been able to find in the record sufficient evidence to support the averments.

We are unable to agree with the court below that the proofs establish the commission by Spalding of the acts of bankruptcy particularly referred to. These acts of bankruptcy are those enumerated by subdivision *a*(4) of § 3 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]). § 3 provides that acts of bankruptcy by a person "shall consist of his having * * * *a*(4), made a general assignment for the benefit of his creditors; or being insolvent applied for a receiver or trustee for his property; or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

Until the amendments of 1903 to the bankrupt act, the appointment of a receiver of the property of an insolvent, whether an individual or a corporation, was not of itself an act of bankruptcy; and this was so whether the appointment was made upon the application of the insolvent or upon the application of creditors. The making of a general assignment for the benefit of creditors was an act of bankruptcy by the terms of subdivision *a*(4), and upon the theory that the appointment of a receiver was equivalent in its results to a general assignment made by the insolvent to a trustee the jurisdiction of the bankruptcy courts had been sought occasionally by creditors who petitioned for an adjudication of bankruptcy alleging such appointment to have been a general assignment for the benefit of creditors; but it was decided that § 3 did not include as one of the enumerated acts of bankruptcy the appointment by a court of a receiver or trustee of the property of an insolvent, and that the "general assignment" of subdivision *a*(4) meant the ordinary common-law general assignment made voluntarily by the

grantor, and those which in many of the states, being regulated by statute, are known as "statutory general assignments." Re Empire Metallic Bedstead Company, 98 Fed. 981, 39 C. C. A. 372; Vaccaro v. Security Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279. In the former of these cases this court held that the procurement by an insolvent of the appointment of a receiver of his property by a state court could not be held to be an act of bankruptcy upon the ground that it produces results equivalent to those brought about by a general assignment for the benefit of creditors, and that the acts of bankruptcy enumerated by the statute could not be enlarged by construction so as to include transactions similar or analogous to, but not identical with, those specified. Doubtless these decisions were influential in leading to the amendments of 1903. It is significant that these amendments are ingrafted upon original subdivision *a*(4), thus indicating that what was in the mind of Congress was a transfer which was equivalent in its results to a general assignment by operating to transfer to a trustee all of the property of an insolvent for the benefit of his creditors. The making of a general assignment by a debtor was always regarded as a confession of his insolvency, and it has sometimes been decided that such an assignment made by a person who was not insolvent at the time, or did not suppose himself to be insolvent, was void, as manifesting an intent to hinder and delay creditors in the collection of their debts. Some of these decisions are referred to in Van Nest v. Yoe, 1 Sandf. Ch. 4. Apparently what Congress intended by the amendment was to place a receivership, whether the appointment was procured by the initiation of the insolvent or whether it was procured by the application of his creditors, upon the same footing as a general assignment by an insolvent, and, when it had occurred, to permit the courts of bankruptcy to administer the estate, and have it distributed conformably with all the provisions of the bankrupt act. It will be observed that the first of the amendatory provisions confines the act of bankruptcy to the appointment of a receiver or trustee upon the application of the insolvent, while the second is a broader provision, and applies whenever a receiver or trustee has been put in charge of the insolvent's property "because of insolvency."

The petition for an adjudication did not allege such an act of bankruptcy as is enumerated in the first of these provisions, and the question to be considered consequently, is whether the proofs

sustain the averment of the petition that a receiver had been put in charge of Spalding's property "because of his insolvency." It appeared by the proofs that the receiver was appointed in an action brought by the corporation W. & J. Sloane, a creditor of Spalding, to set aside a conveyance and transfer of certain real and personal property of Spalding, made, as was alleged, with intent to hinder, delay, and defraud his creditors, and particularly the plaintiff. The plaintiff made application to the Supreme Court for the appointment of a receiver *pendente lite*, and the order appointing the receiver, in granting the application, recites the ground for the appointment as follows:

"That the plaintiff is a judgment creditor of the defendant, Robert H. Spalding, and that its executions against his property issued by its judgments have been returned wholly unsatisfied; that the defendant, Robert H. Spalding, has been conveying, mortgaging, and otherwise disposing of his property in fraud of the plaintiff's rights and just demands, and is threatening to make further conveyances and dispositions thereof in fraud of the rights and just demands of the plaintiff."

Giving subdivision *a*(4) the construction which its language demands, we are of the opinion that it does not make a receivership an act of bankruptcy unless it was procured upon the application of the insolvent himself, and while insolvent; and does not make the putting a receiver in charge of the property of an insolvent an act of bankruptcy unless this was done because of insolvency; and if the latter provision applies to any case where the trustee has not been put in charge pursuant to some statute of the state, or a receiver put in charge by a court acting under statutory authority, it certainly applies only when this has been done because of insolvency. In most of the states statutory provisions exist conferring jurisdiction upon designated courts for the appointment of receivers. The statutes of New York authorize the appointments of receivers of corporations in cases of insolvency, but there is no statute authorizing the appointment by any court of a receiver of the property of an individual merely upon the ground of his insolvency. The appointment in the present case was doubtless made pursuant to §.713 of the Code of Civil Procedure, which authorizes the appointment of a receiver of "the property which is the subject of the action," upon the application of a party who establishes an "apparent right to or interest in the property, where it is in the possession

of an adverse party" and when its custody by a receiver becomes expedient.

Inasmuch as in the present case the receiver was not appointed upon the application of Spalding, it is immaterial whether Spalding was at the time insolvent. It is also immaterial that the plaintiff in the action may have alleged as one of the evidential facts of fraud that Spalding was insolvent. It suffices that the court in exercising its authority did not purport to do so upon that ground, and that the order appointing the receiver and reciting the grounds for the action of the court is conclusive to the contrary. The receiver was appointed because the court found that Spalding had disposed and was threatening to dispose of his property with intent to defraud the plaintiff in the action and other creditors, and assigned this as the only ground for its action in putting a receiver in charge of his property. If the court had merely appointed a receiver, without reciting the grounds of its judgment, the record could have been referred to, or the grounds shown by evidence *aliunde*. Russell v. Place, 94 U. S. 608, 24 L. ed. 214; Davis v. Brown, 94 U. S. 428, 429, 24 L. ed. 204. But, having recited the grounds, the recitals cannot be contradicted without impeaching the record; and this is inadmissible. In re Watts, 190 U. S. 35, 23 Sup. Ct. 718, 47 L. ed. 933. That the appointment of a receiver under the circumstances of this case is not such an act of bankruptcy as is contemplated by subdivision *a*(4) is enforced by the consideration that such acts as led to the appointment are of themselves acts of bankruptcy by the terms of subdivision *a*(1) of § 3. It is not to be presumed that Congress intended to amend the section so as to create as an additional act of bankruptcy, one which was already included in the section. * * *

The adjudication of bankruptcy is reversed, with costs, and with instructions to dismiss the petitions of the original and intervening creditors for an adjudication of bankruptcy.

5. ADMISSION IN WRITING

IN RE WILMINGTON HOSIERY CO.

120 Fed. 179

(District Court, D. Delaware. January 12, 1903)

BRADFORD, D. J. This is a motion to dismiss a petition in involuntary bankruptcy filed against the Wilmington Hosiery

Company, a corporation of Delaware. Only one alleged act of bankruptcy is set forth. It is as follows:

"That said Wilmington Hosiery Company is insolvent and that within four months next preceding the date of this petition the said Wilmington Hosiery Company committed an act of bankruptcy in that it did heretofore, to-wit, on the 28th day of August, A. D. 1902, upon petition to the chancellor of the state of Delaware, praying for the appointment of receiver for said Wilmington Hosiery Company, on the ground of insolvency, acknowledged under the oath of its president that said insolvency existed and consented to the appointment of such receiver on the ground of said insolvency, a certified copy of which petition with the answer thereto and the order of the chancellor thereon is hereunto annexed, and your petitioners pray may be taken as a part of this petition."

The petition or bill in chancery contains the following averment:

"That said respondent corporation has become, and is now, insolvent and unable to pay its debts, and that it will be for the benefit of the stockholders and creditors of the said corporation, that a receiver be appointed for the purpose of preserving its assets, and properly adjusting its business and liabilities."

It then prays for the appointment of such receiver. The company in its answer admitted the truth of the above averment, and the chancellor thereupon appointed a receiver as prayed. It is properly conceded by the counsel for the petitioners that the petition in bankruptcy in its present form cannot be sustained unless what is alleged as an act of bankruptcy can be regarded as an admission by the company in writing of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. But such a conclusion is wholly inadmissible. While the company admitted in writing its insolvency it did not expressly or by implication admit its willingness to be adjudged a bankrupt. In fact, although admitting the truth of the averment of insolvency, it did not allege a willingness to have a receiver appointed; but, if its admission of insolvency carried with it implied consent to the appointment of a receiver, the aspect of the case would not be materially different. A written admission of insolvency and consent to have a receiver appointed by the chancellor cannot be regarded as a written admission of inability to pay debts and willingness to be adjudged bankrupt. No doctrine of equivalency is applicable in

this connection. Further, to hold the one equivalent to and of the same effect as the other not only would be unwarranted by the language and meaning of the bankruptcy act, but would be calculated as a precedent to produce uncertainty and confusion in its administration. * * * The petition will be dismissed with costs.

CHAPTER III

ADMINISTRATION

SECTION I

RECEIVER

BOONVILLE NAT. BANK v. BLAKEY

107 Fed. 891, 47 C. C. A. 43

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901)

On February 2, 1899, an involuntary petition in bankruptcy was filed against M. Falson, and on February 28th he was adjudged a bankrupt. On March 7th (no trustee having been selected) the petitioning creditors asked for the appointment of a receiver upon three grounds: (1) That it was necessary for some person to take charge of the bankrupt's books, etc., to prepare a list of creditors; (2) that the estate included realty needing immediate care and attention; (3) that the bankrupt had preferred certain creditors, and that the preferences should be recovered by a trustee or receiver. The court thereupon appointed Blakey as receiver, who filed a bill in equity against several parties (including the Boonville National Bank and the People's State Bank) seeking to recover alleged preferences. The banks were decreed to pay certain sums to the receiver and appeal from the decree. See 95 Fed. 267.

JENKINS, Circuit Judge [after discussing the timeliness of the appeal]. * * *

The case involves the important question, patent upon the face of the bill, whether a receiver in bankruptcy, appointed before the selection of a trustee, can maintain suit to recover the amount of a preferential payment made by the debtor prior to the bankruptcy. * * *

The authority for the appointment of a receiver in bankruptcy proceedings comes from the act and is limited by the act. The order of the court appointing him cannot be broader than the statute. The receiver is a statutory receiver, and not a general

receiver. The latter is appointed by a court of chancery by virtue of its inherent power, independent of any statute. His authority is derived from, and his duty prescribed by, the order of appointment, and he is called a common-law receiver. Herring v. Railroad Co., 105 N. Y. 340, 12 N. E. 763. A statutory receiver is one appointed in pursuance of special statutory provisions. He derives his power from the statute, and to it must look for the duty imposed upon him. He possesses such power only as the statute confers, or such as may be fairly inferred from the general scope of the law of his appointment. We are therefore referred to the bankrupt act (30 Stat. c. 541) to ascertain the power of the bankruptcy court to appoint a receiver, and the extent of the power which the act confers upon him. By § 2, cl. 3, the courts of bankruptcy are invested with authority to "appoint receivers or the marshals upon application of parties in interest, in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified," and to (§ 2, cl. 5) authorize the business of the bankrupts to be conducted for limited periods by receivers and marshals or trustees, if necessary, in the best interests of the estates. These are the sole provisions of the act which authorize a receiver and define his duties. There is, however, another provision which may properly be considered in this connection. In § 69 it is provided that before adjudication upon an involuntary petition, when it shall appear to the judge that the property of the alleged bankrupt is being neglected, so that it will deteriorate in value, a warrant may be issued to the marshal to seize and hold the property subject to further order, upon the petitioning creditors giving bond to indemnify the alleged bankrupt for the damages he shall sustain if such seizure shall be proved to have been wrongfully obtained, and the property, when seized, shall be released upon bond filed by the alleged bankrupt conditioned to turn over the property or its value in money to the trustee in the event of adjudication of bankruptcy.

What, then, is the intent of the law with respect to the rights and powers of the receiver? The statute requires (§ 55) that the court shall cause the first meeting of creditors to be held not more than 30 days after the adjudication, and if, through mischance, the meeting should not be held within that time, the court shall fix the date as soon as may be thereafter when it shall be held. § 44 provides that creditors at their first meeting after

adjudication shall appoint a trustee, and, failing therein, the court shall do so. He is by § 70*a* vested by operation of law with the title as of the date of adjudication, except exemptions, to the property of the bankrupt, with power of sale and disposition. Subdivision "*e*" authorizes the trustee to avoid any transfer by the bankrupt of his property which any creditor might have avoided, and to recover the property so transferred or its value. § 60*a* defines a preference, and § 60*b* provides that a preference within four months of the filing of the petition to one having reasonable cause to believe that it was intended thereby to give a preference shall be voidable by the trustee, and he may recover the property so transferred or its value. We can now discover, as we think, the general purpose of this law. It was that the property of the bankrupt should be vested in a trustee, to be selected by creditors; that such officer should have the general control and management of the estate, and the right to recover for the benefit of creditors all property transferred in fraud of the act. It contemplated that between the filing of the petition and the adjudication of bankruptcy an emergency might arise with respect to the care of the bankrupt's property; and, in involuntary cases, for the protection of the property in the interval between the filing of the petition and the adjudication, the bankruptcy court was authorized to direct the marshal to seize and hold the property pending adjudication. So, also, in voluntary or involuntary cases, when it was found absolutely necessary for the preservation of an estate, the court should appoint a receiver or the marshal to take charge of the property of the bankrupt until the petition is dismissed or the trustee is qualified. It plainly was not contemplated that the receiver or the marshal so designated should supersede the trustee or exercise the general powers conferred upon a trustee. There is no such power specifically conferred or any provision in the act from which such power can reasonably be implied. Such temporary receiver, whether he be the marshal or another, is not a trustee for the creditors, but is a caretaker and custodian of the visible property pending adjudication and until a selection of a trustee. If in any sense a trustee, he is trustee for the bankrupt, in whom is the title to the property until it passes by operation of law as of the date of adjudication to the trustee selected by the creditors. The duty required and the power conferred clearly are that the receiver or the marshal should take possession of property that would otherwise go to waste, and hold it and pre-

serve it, so that it might come to the trustee, when selected, without needless injury. There might also be an occasion when the business of the bankrupt ought not, in the interest of the creditors, to be temporarily suspended, as for example in the case of a hotel or other business, where the value of the good will required that it should be kept a going concern until the trustee should be appointed, and for a limited time after the trustee was appointed, that he might dispose of it profitably for the creditors.

We fail to find any provision in this law which sanctions the bringing of a suit by a receiver to recover a preferential payment to a creditor. Such a right does not come within the purpose for which a receiver is authorized, and is neither expressly nor impliedly sanctioned. A preferential payment to a creditor could not be recovered back by the bankrupt. It could not be gainsaid by a creditor, unless through the trustee and under the bankrupt act. The transaction is not void even under the act. It is voidable merely, and voidable only by the trustee. The payment is not inherently wrong, being in discharge of an honest debt. The trustee, as representative of and in the interest of all the creditors, and not of the petitioning creditors alone, is to determine in the first instance whether the payment was made with a view to give a preference, and whether the creditor receiving payment had reasonable cause to believe that it was so and if proof is forthcoming. He is to ascertain the facts and to determine the probability of successful litigation, and whether the creditor sought to be pursued is responsible, so that the estate should not be mulcted in unnecessary litigation and costs. The receiver or marshal is, in the contemplation of the act, merely the temporary custodian selected to take possession of visible property liable to waste, and to conserve it until the trustee shall be selected by the creditors within the 30 days limited, or appointed by the court; but he is vested with no right to avoid a transaction which by the act is specifically given to the trustee, and which, but for the act, would not exist. It is not within the spirit or letter of the law that the necessity of a trustee should be superseded. It is required that at the earliest opportunity—at the first meeting of creditors—he should be selected. If the creditors therein fail, the duty upon the court is imperative—not permissive—to appoint one. The receiver or marshal takes possession of the visible property of the bankrupt for delivery to the trustee,—not to pursue the debtors of the

estate, not to enforce rights of action vested in the trustee alone, not to involve the estate in possibly unnecessary litigation.

We think we should do violence to both the letter and the spirit of the act to enlarge the functions of a mere temporary custodian, and to construe the law as vesting him with functions, powers, and duties which are clearly not contemplated by the act. It follows, therefore, that the receiver had no right to declare void the payments in question and no right to recover the sums demanded. That can only be done by the trustee; for in no other officer is the right vested. We do not say that the receiver may not, by suit or otherwise, assert or defend his possession of the visible property which the law has placed in his custody. That question is not before us. But he cannot usurp the functions of a trustee and avoid payments to creditors when no right so to do is conferred by the law.

* * * the decree is reversed and the cause is remanded, with directions to dismiss the bill. * * *

SECTION II

PROVABLE CLAIMS

A. In General

WETMORE v. MARKOE (formerly Wetmore)

196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. 172

(United States Supreme Court. December 19, 1904)

On June 12, 1890, an action for divorce and alimony was begun by Annette B. W. Wetmore, wife of the plaintiff in error, in the Supreme Court of the state of New York, and on April 1, 1892, at special term, the plaintiff in error was found guilty of adultery as charged in the complaint, and a divorce was granted upon that ground to the defendant in error. The divorce was

Ancillary Receiverships.—Before the amendment of 1910 the courts were not agreed as to the jurisdiction of bankruptcy courts to appoint ancillary receivers or to entertain ancillary proceedings generally. See Collier on Bankruptcy, (10th ed.), 26. § 2, clause 20, of the bankruptcy act now invests the courts of bankruptcy with jurisdiction to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." The amendment would seem to settle the controversy.

absolute, and awarded to the wife the custody and care of the three minor children of the marriage, and also, as alimony, the sum of $3,000 per annum so long as she should live, to be paid in quarterly instalments of $750 each on the first day of the months of July, October, January, and April of each year. There was also granted to the wife the sum of $3,000 annually, being $1,000 for the education and maintenance of each of the three minor children, to be paid in quarterly instalments, until such children should arrive at the age of twenty-one years respectively. Plaintiff in error was also required to give security for the payment of the alimony awarded. The decree did not reserve any right of subsequent modification or amendment. On January 13, 1899, there was due to the wife from the plaintiff in error, for arrears in alimony and allowance under the decree, the sum of $19,221.60. Upon that day, upon application to the District Court of the United States for the eastern district of Pennsylvania, the plaintiff in error was adjudicated a bankrupt. The defendant in error made no proof of her claim for alimony in the bankrupt proceedings. On June 21, 1900, the plaintiff in error was granted a discharge from all debts and claims provable under the bankruptcy act. On December 12, 1901, plaintiff in error sued out a writ in the Supreme Court of the state of New York for an order enjoining and restraining all proceedings on behalf of the defendant in error for the collection of the arrears of alimony and allowance aforesaid. This application was denied, upon the ground, as it appears from the memorandum of the judge who rendered the decision, that the arrears of alimony were not discharged in bankruptcy. From the order denying the application an appeal was taken by the plaintiff in error to the appellate division of the Supreme Court of the state of New York, where the order below was affirmed, 72 App. Div. N. Y. 620. The plaintiff in error thereupon appealed to the Court of Appeals of the state of New York, and on June 27, 1902, the appeal was dismissed for want of jurisdiction, without any judgment of affirmance or reversal upon the merits, 171 N. Y. 690. A writ of error was sued out seeking in this court a reversal of the judgment of the Supreme Court of the state of New York.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the court:

It is conceded in argument by counsel for the plaintiff in

error that this case would be within the decision of this court in Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1010, 21 Sup. Ct. Rep. 735, if the judgment for alimony had been rendered in a court having control over the decree with power to amend or alter the same. It is insisted, however, that, there being in this case no reservation of the right to change or modify the decree, it has become an absolute judgment, beyond the power of the court to alter or amend, and is therefore discharged by the bankruptcy proceedings. Walker v. Walker, 155 N. Y. 77, 49 N. E. 663; Livingston v. Livingston, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600, 66 N. E. 123. It may be admitted to be the effect of these decisions of the New York Court of Appeals that, in the absence of any reservation of the right to modify or amend, the judgment for alimony becomes absolute. The question presented for decision, in view of this state of the law is, Has the decree become a fixed liability evidenced by a judgment, and therefore provable against the estate of the bankrupt, within the protection of the discharge in bankruptcy? § 63 of the act of 1898 provides:

"§ 63. Debts which may be proved:

"*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest." [30 Stat. at L. 562, c. 541, U. S. Comp. Stat. 1901, p. 3447.]

It is not contended that this section includes instalments of alimony becoming due after the adjudication, but the contention is that prior instalments have become an existing liability, evidenced by the judgment, and therefore a provable debt. While this section enumerates under separate paragraphs the kind and character of claims to be proved and allowed in bankruptcy, the classification is only a means of describing "debts" of the bankrupt which may be proved and allowed against his estate.

The precise question, therefore, is, Is such a judgment as the one here under consideration a *debt* within the meaning of the act? The mere fact that a judgment has been rendered does not prevent the court from looking into the proceedings with a view of determining the nature of the liability which has been

reduced to judgment. Boynton v. Ball, 121 U. S. 457, 466, 30 L. ed. 985, 987, 7 Sup. Ct. Rep. 981. The question presented is not altogether new in this court. In the case of Audubon v. Shufeldt, 181 U. S. 577, 45 L. ed. 1010, 21 Sup. Ct. Rep. 736, Mr. Justice Gray, delivering the opinion of the court said:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may, therefore, be there enforced by suit. Barber v. Barber (1858), 21 How. 582, 16 L. ed. 226; Lynde v. Lynde (1901), 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction."

In the same opinion Mr. Justice Gray quoted from Barclay v. Barclay, 184 Ill. 375, 51 L. R. A. 351, 56 N. E. 636, in which case it was adjudged that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy:

"The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. * * * It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting impris-

onment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence, such alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court."

It is true that, in the cases referred to, the decrees were rendered in courts having continuing control over them, with power to alter or amend them upon application; but this fact does not change the essential character of the liability, nor determine whether a claim for alimony is, in its nature, contractual so as to make it a debt. The court having power to look behind the judgment, to determine the nature and extent of the liability, the obligation enforced is still of the same character notwithstanding the judgment. We think the reasoning of the Audubon Case recognizes the doctrine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation, or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty, and enforces it against him by means of legal proceedings.

It is true that in the state of New York at the time this decree was rendered there was no power to modify or alter the decree for alimony and allowance in the absence of special reservation. But this does not change the grounds upon which the courts of the state proceeded in awarding the alimony and allowances. In the case of Romaine v. Chauncey, 129 N. Y. 566, 14 L. R. A. 712, 26 Am. St. Rep. 544, 29 N. E. 826, it was held that alimony was awarded, not in the payment of a debt, but in the performance of the general duty of the husband to support the wife. This case was quoted with approval by Mr. Justice Gray in Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735.

In Walker v. Walker, 155 N. Y. 77, 49 N. E. 663, and Livingston v. Livingston, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600, 66 N. E. 123, the effect of the holdings is that a judg-

ment for alimony, in the absence of reservation, is a fixed and unalterable determination of the amount to be contributed to the wife's support after the decree, and is beyond the power of the court to change even under the authority of subsequent legislation. These cases do not modify the grounds upon which alimony is awarded, and recognize that an alimony decree is a provision for the support of the wife, settled and determined by the judgment of the court.

In the case of Dunbar v. Dunbar, decided by this court at the October term, 1902 (190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757), it was held that a contract made after divorce between husband and wife, by which the former agreed to pay the latter a certain sum of money annually for her support during her life, or so long as she remained unmarried, and also to pay a certain sum of money to her annually for the support of the minor children of the marriage, whose custody was awarded to the mother, was not discharged by a subsequent proceeding and discharge in bankruptcy. It was further held that the sum agreed to be paid for the support of the minor children was but a recognition of the liability of the father for their support, and that the fact that the annual instalments were made payable to the wife made no difference in the character of the obligation. Of this feature of the contract the court, speaking by Mr. Justice Peckham, said:

"In relation to that part of the husband's contract to pay for the support of his minor children until they respectively become of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the states. In this case the decree of the court provided that the children should remain in the custody of the wife, and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. * * * We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do should be discharged in that way. As his discharge would not in any event terminate his obligation to support his children during

their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfilment thereof should be discharged. It is true his promise is to pay to the mother; but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose."

We think this language is equally applicable to the present case in that aspect of the decree which provides for the support of the minor children. The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the husband to support his children, and is not a debt in any just sense.

It is urged that the amendment of the law made by the act of February 5, 1903 [32 Stat. at L. 797, c. 487], excepting from the operation of a discharge in bankruptcy a decree for alimony due or to become due, or for the maintenance and support of the wife and minor children, is a legislative recognition of the fact that, prior to the passage of the amendment, judgments for alimony would be discharged. In Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757, it was said that this amendment, while it did not apply to prior cases, may be referred to for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife and children. The amendment may also have been passed with a view to settling the law upon this subject, and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both state and Federal, upon this question. Indeed, in view of the construction of the act in this court in Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, it may be said to be merely declaratory of the true meaning and sense of the statute. United States v. Freeman, 3 How. 556, 11 L. ed. 724; Bailey v. Clark, 21 Wall. 284, 288, 22 L. ed. 651, 653; Cope v. Cope, 137 U. S. 682, 684, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222. The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes, and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce. Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to

have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes. Unless positively required by direct enactment the courts should not presume a design upon the part of Congress, in relieving the unfortunate debtor, to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children. While it is true in this case the obligation has become fixed by an unalterable decree so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests, we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect, and making available to the wife and children, the right which the law gives them as against the husband and father.

We find no error in the judgment of the Supreme Court of the state of New York, and the same is affirmed.[1]

ZAVELO v. REEVES et al.

227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. 365

(United States Supreme Court. February 24, 1913)

Mr. Justice PITNEY delivered the opinion of the court:

Defendants in error sued plaintiff in error November 22, 1907, in the City Court of Birmingham, Alabama, declaring upon the common counts for moneys due December 10, 1906, and February 19, 1906, and by an amendment declared upon a promissory note for about $250, which was a part of a claim of the defendants in error that antedated the bankruptcy of the plaintiff in error. The defendant (now plaintiff in error) pleaded that on November 22, 1905, he filed in the District Court of the United States for the northern district of Alabama, his petition in bankruptcy; that said court had jurisdiction of said bankruptcy proceedings, and duly adjudicated him a bankrupt on that date; that subsequently he offered a composition to his creditors, and the offer was accepted and a composition made in said proceedings and duly confirmed by said District Court February 6, 1906,

1—See In re Moore, 111 Fed. 145; In re Southern Steel Co., 183 Fed. 498; In re Spot-Cash Hooper Co., 188 Fed. 861; James v. Gray, 131 Fed. 401.

a certified copy of the decree of confirmation being attached to and made a part of the plea; that the plaintiffs were then creditors of the bankrupt, and as such accepted the offer of composition and were paid a dividend thereon; that the claim sued on herein is a part of and was included in said claim on which said dividend was paid, and the claim herein is barred by said proceedings and discharged by said composition. The plaintiffs replied, (a) that on January 1, 1906 (which date was after the adjudication and before the discharge), defendant promised that if plaintiffs would lend him $500 for use in paying the consideration of a composition with his creditors in said bankruptcy proceedings, he, defendant, when said composition was confirmed, would pay plaintiffs the balance of the demand sued on, after deducting therefrom plaintiffs' share of the consideration of such composition; and plaintiffs averred that they accepted defendant's said offer and promise, and did so lend him the said sum of $500 for the said purpose; and (b) for further replication, that after the filing of defendant's said petition in bankruptcy, and after he had been adjudged a bankrupt, defendant promised plaintiffs that he would pay what he owed them, being the same demand sued on herein, when his composition in bankruptcy was confirmed, and that plaintiffs accepted said promise. To these replications the defendant demurred. The City Court overruled the demurrers and proceeded to a trial of the issues of fact, which resulted in favor of the plaintiffs upon both the common counts and the note. The defendant appealed to the Supreme Court of Alabama, which affirmed the judgment. 171 Ala. 401, 54 So. 654. Whereupon he sued out the present writ of error.

The case is brought here under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), the contention being that a right or immunity set up and claimed by the plaintiff in error under the Federal bankruptcy act was denied by the State Court. See Linton v. Stanton, 12 How. 423, 13 L. ed. 1050; Mays v. Fritton, 131 U. S. cxiv, Appx. and 21 L. ed. 127; Hill v. Harding, 107 U. S. 631, 27 L. ed. 493, 2 Sup. Ct. Rep. 404; Rector v. City Deposit Bank, 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289.

It is not contended that the record imports a secret or fraudulent agreement between the bankrupt and the plaintiffs at the expense of other creditors. The State Court construed the replications as not averring secrecy or fraud, saying (171 Ala. 408): "That an advantage accrued to plaintiffs as the result of the loan is true; but that it came as a result of fraud, collusion, or extor-

tion, cannot be read from these replications. On the contrary, the advantage, so far as the pleadings show, was the result of the advancement made by way of the loan described. There is nothing in the replications on which to rest a conclusion that anything other than the loan induced the promise relied on for recovery here."

This construction of the pleadings is not disputed here. We therefore are not in this case concerned with the general equitable principle that composition agreements are invalid if based upon or procured by a secret arrangement with one or more favored creditors, in violation of the equality and reciprocity upon which such an agreement is avowedly based. Story, Eq. Jur. 9th ed. §§ 378, 379; Clarke v. White, 12 Pet. 178, 199, 9 L. ed. 1046, 1055; Wood v. Barker, L. R. 1 Eq. 139, 35 L. J. Ch. N. S. 276, 11 Jur. N. S. 905, 13 L. T. N. S. 318, 14 Week. Rep. 47; McKewan v. Sanderson, L. R. 20 Eq. 65, 44 L. J. Ch. N. S. 447, 32 L. T. N. S. 385, 23 Week. Rep. 607; Bissell v. Jones, L. R. 4 Q. B. 49, 9 Best & S. 884, 38 L. J. Q. B. N. S. 2, 19 L. T. N. S. 262, 17 Week. Rep. 49; Ex parte Nicholson, L. R. 5 Ch. 332, 22 L. T. N. S. 286, 18 Week. Rep. 411; Crossley v. Moore, 40 N. J. L. 27, 34; Feldman v. Gamble, 26 N. J. Eq. 494; Dicks v. Andrews, 132 Ga. 601, 604, 64 S. E. 788, 16 Ann. Cas. 1070.

Of the questions raised, only three deserve notice.

(1) It is contended that the transaction set up in the former of the two replications mentioned was in violation of the prohibition of § 29*b*, cl. 5 of the bankruptcy act (30 Stat. at L. c. 541, pp. 544, 554, U. S. Comp. Stat. 1901, pp. 3418, 3433), which declares that "a person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently * * * extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings." It is sufficient to say that we are unable to see in this record anything of extortion or attempted extortion.

(2) It is contended as to both replications that although a debt barred by discharge in bankruptcy may be revived by a new promise made after the discharge, this cannot be done by a new promise made in the interim between the adjudication and the discharge.

It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is

sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge. Kirkpatrick v. Tattersall, 13 Mees. & W. 766, 1 Car. & K. 577, 14 L. J. Exch. N. S. 209, 9 Jur. 214; Otis v. Gazlin, 31 Me. 567; Hornthal v. McRae, 67 N. C. 21; Fraley v. Kelly, 67 N. C. 78; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926; Knapp v. Hoyt, 57 Iowa, 591, 42 Am. Rep. 59, 10 N. W. 925; Lanagin v. Nowland, 44 Ark. 84; Wiggin v. Hodgdon, 63 N. H. 39; Griel v. Solomon, 82 Ala. 85, 60 Am. Rep. 733, 2 So. 322; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338.

Our attention is not called to any decision in point arising under the present bankruptcy act; but we deem it clear that the same rule should be applied. If there is any distinction between this and former acts that would require a different rule, it must arise from the time to which the discharge is made to relate. As to this, § 17 of the act of 1898 declares that "a discharge in bankruptcy shall release a bankrupt from all his provable debts," with certain exceptions not now pertinent. For the definition of "provable debts" we are referred to § 63, which is set forth in full in the margin.[2] Of the several classes of liabilities, those

2—§ 63. *Debts Which May be Proved.*—a Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prose-

in clauses 1, 2, and 3 are in terms described as existing at or before the filing of the petition. Clause 5 relates to liabilities "founded upon provable debts reduced to judgment after the filing of the petition," etc.; plainly meaning that they arose before its filing. Clause 4 describes simply debts that are "founded upon an open account, or upon a contract, express or implied," not in terms referring to the time of the inception of the indebtedness. But, reading the whole of § 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under § 63*a*, cl. 4, include only such as existed at the time of the filing of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, 1898, under the authority conferred by § 30, a form of discharge was prescribed (Forms in Bankruptcy, No. 59), by which it is ordered that the bankrupt "be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the — day of ———, A. D. ——, on which day the petition for adjudication was filed—him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." And the forms prescribed for proof of debts all declare that the indebtedness existed "at and before the filing of the said petition." Forms 31 to 36, inclusive. The General Orders and Forms, etc., are to be found in 172 U. S. 700-704, 43 L. ed. 1217, 1218, 18 Sup. Ct. Rep. xxxii.-xxxv.; 32 C. C. A. lxvi.-lxix., 89 Fed. xlii.-xlv.; 3 Foster, Fed. Pr. 4th ed. 2526, 2559, 2572.

The view above expressed as to clause 4 of § 63*a* is the same that has been generally adopted in the Federal District Courts. Re Burka, 104 Fed. 326; Re Swift, 50 C. C. A. 264, 112 Fed. 315, 321; Re Adams, 130 Fed. 381; Coleman Co. v. Withoft, 195

cute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Fed. 250, 252; and see Re Roth, 31 L. R. A. (N. S.) 270, 104 C. C. A. 649, 181 Fed. 667, 673.

And so, upon the whole matter, we conclude that under the present act an express promise to pay a provable debt is good although made after the filing of the petition and before discharge.

(3) What has been said disposes at the same time of the contention that the promises set up in the two replications under consideration were discharged by the confirmation of the composition. As these obligations were entered into after the adjudication of bankruptcy, they were, of course, not provable under § 63, and only provable debts are discharged.

With respect to the money loaned to the bankrupt for use in paying the consideration of the composition, it is perhaps worth while to remark that § 12 of the act, in prescribing the time and mode of offering terms of composition, plainly contemplates that a composition in money may be offered, and expressly prescribes that an application for the confirmation of a composition may be made after, but not before, "the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority, and the cost of the proceedings, have been deposited in such place as shall be designated by, and subject to the order of, the judge." And the same section provides that "upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed."

The act, of course, contemplates that the bankrupt may acquire the money required for the purposes of the composition by the use of his credit.

Judgment affirmed.[3]

B. Tort Claims

CRAWFORD et al. v. BURKE

195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. 9

(United States Supreme Court. November 7, 1904)

This was an action in trover instituted September 10, 1897, in the Circuit Court of Cook county, Illinois, by Burke against

3—See In re Swift, 112 Fed. 315; In re Neff, 157 Fed. 57; Duquesne Incandescent Light Co., 176 Fed. 785.

Crawford & Valentine, plaintiffs in error, to recover damages for the wilful and fraudulent conversion of certain reversionary interests of the plaintiff in 550 shares of Metropolitan Traction stock.

There were ten counts in the declaration. In each of the first five counts it was alleged that the defendant firm of Crawford & Valentine were stock brokers and dealers in investment securities; that plaintiff employed the defendants as his brokers and agents to buy, hold, and carry stocks for him, subject to his order; that defendants had in their possession, or under their control, certain shares of the capital stock of the Metropolitan Traction Company, which they were holding as a pledge and security for the amount due them from the plaintiff on said stock; that defendants wrongfully, wilfully, and fraudulently, and without his knowledge or consent, sold said shares of stock, and wilfully and fraudulently, and with intent to cheat and defraud the plaintiff, converted plaintiff's reversionary interest in said stock to their use, whereby it was wholly lost.

In each of the last five counts it was alleged that after defendants had wrongfully and fraudulently, and without plaintiff's knowledge or consent, sold the plaintiff's stock, and converted the proceeds of such sales to their own use, they falsely and fraudulently represented to him that they still had the stock on hand and were carrying it for him; that their correspondents in Philadelphia, where the stock had been bought, were calling upon them for further demands or margins, and that it therefore became necessary to call upon the plaintiff to make further payments on the stock in order to comply with their correspondents' demands and to be secured against loss. It was averred in each of said counts that such representations were false and fraudulent, and by means thereof defendants obtained from the plaintiff the aggregate sum of $10,800.

To this declaration defendants pleaded not guilty, upon which issue was joined January 4, 1900, and on May 12, 1900, a jury trial was waived in writing. The case rested without action until January 3, 1901, when defendants filed their separate pleas of *puis darrein continuance,* setting up that on April 5, 1900, the defendants had received their discharge in bankruptcy, in the District Court for the northern district in Illinois, and that plaintiff's claims were provable and not excepted from the operation of such discharge. The plaintiff replied, denying that his claim

was provable, and averred that the same was excepted from such operation.

Notwithstanding the plea of *puis darrein continuance,* the plaintiff introduced evidence and proved the allegations in his declaration, and the amount of damages he had sustained. Defendants were found guilty upon all the counts, and judgment entered against them.

The case was taken to the Appellate Court, where, it appearing that one of the justices had taken part in the trial of the case below, and that the two remaining justices were unable to agree upon the case, the judgment of the Circuit Court was affirmed. The judgment of the Appellate Court was also affirmed by the Supreme Court of Illinois (201 Ill. 581, 66 N. E. 833), to review which judgment this writ of error was sued out.

Mr. Justice BROWN, after making the foregoing statement, delivered the opinion of the court:

A year after this case was put at issue, and upon the opening of the trial, defendants filed their separate pleas *puis darrein continuance,* setting up their discharge in bankruptcy, and averring that plaintiff's claim was a provable debt, and the discharge a complete defense.

* * *

But notwithstanding this, plaintiff was permitted to introduce evidence in proof of the fraud alleged in his declaration; and upon the conclusion of the trial the court found there had been a conversion of plaintiff's reversionary interest in the stock, for which he "had a right to recover in trover," and that it was not such a debt as was barred by the bankruptcy act. Upon appeal to the Supreme Court it was held that it was not necessary to the judgment to decide whether the allegations of the declaration were admitted by the pleadings, as they were established by the proof which had been adduced by plaintiff, "and, the propositions held as law on that branch of the case being correct, judgment for plaintiff necessarily follows." That court also held that the case, being one of fraud, was not covered by the defendants' discharge in bankruptcy.

The only Federal question involved in the case is whether the Supreme Court of Illinois gave the proper effect to the discharge pleaded by the defendants. If plaintiff's claim was not a provable debt, or was expressly excepted from the operation of the discharge the decision of that court was right; but if it

was covered by the discharge, such discharge was a complete defense.

§ 17 of the bankruptcy act of 1898 contains, among other things, the following provisions:

"§ 17. A discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity." [30 Stat. at L. 550, c. 541, U. S. Comp. Stat. 1901, p. 3428.]

Under this section, whether the discharge of the defendants in bankruptcy shall operate as a discharge of plaintiff's debt, it not having been reduced to judgment, depends upon the fact whether that debt was "provable" under the bankruptcy act,—that is, susceptible of being proved; second, whether it was or was not created by defendant's fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

1. Provable debts are defined by § 63, a copy of which appears in the margin.[4] Paragraph *a* of this section includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph *b*, two constructions are possible: It may relate to all unliquidated demands, or only to such as may arise upon such contracts, express or implied, as are covered by paragraph *a*.

Certainly paragraph *b* does not embrace debts of an unliquidated character and which in their nature are not susceptible of being liquidated. Dunbar v. Dunbar, 190 U. S. 340, 350, 47 L. ed. 1084, 1092, 23 Sup. Ct. Rep. 757. Whether the effect of paragraph *b* is to cause an unliquidated claim which is susceptible of liquidation, but is not literally embraced by paragraph *a*, to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provision of paragraph *a*, as one "founded upon an open account, or upon a contract, express or implied," and might have been proved under § 63*a* had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate. He

4—See note 2, *supra*.

did not elect to do this, however, but brought an action of trover, setting up a fraudulent conversion of his property by defendants. In the first five counts of his declaration he charges a fraudulent conversion of his interest in the stock, and, in the last five counts, that the defendants had induced him to make further payments on such stock in the way of margins, by false and fradulent representations.

The question whether the claim thus set forth is barred by the discharge depends upon the proper construction of § 17, which declares that the discharge in bankruptcy relieves the bankrupt from all of his "provable debts," except such as "* * * (2) are judgments in actions for frauds, or obtaining property by false pretenses, or false representations, or for wilful and malicious injuries to the person or property of another, * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity."

* * *

2. But it is strenuously insisted by the plaintiff that a claim for the conversion of personal property is not within the scope of § 17, because it is not a "provable debt" within the definition of § 63*a*. Did the latter section stand alone, there would be some ground for saying that a claim, though "founded upon an open account, or upon a contract, express or implied," would not be a provable debt, if plaintiff elected to treat the conversion as fraudulent, and sue in trover, though he might have chosen to waive the tort, and bring an action for a balance due on account. An early English case (Parker v. Crole, 5 Bing. 63, 2 Moore & P. 150) is cited to the effect that the operation of the discharge is determined by the election of the creditor to sue in *assumpsit* or case. A like ruling was made in certain cases under the bankruptcy acts of 1841 and 1867. Williamson v. Dickens, 27 N. C. (15 Ired. L.) 259; Hughes v. Oliver, 8 Pa. 426; Bradner v. Strang, 89 N. Y. 299-307.

But we think that § 63*a*, defining provable debts, must be read in connection with § 17, limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity. If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of a dis-

charge? We are, therefore, of opinion that if a debt originates or is "founded upon an open account or upon a contract, express or implied," it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover, as for a fraudulent conversion, instead of in *assumpsit*, for a balance due upon an open account. It certainly could not have been the intention of Congress to extend the operation of the discharge under § 17 to debts that were not provable under § 63*a*. It results from the construction we have given the latter section that all debts originating upon an open account or upon a contract, express or implied, are provable, though plaintiff elect to bring his action for fraud.

In the case under consideration defendants purchased, under the instructions of the plaintiff, certain stocks, and opened an account with him, charging him with commission and interest, and crediting him with amounts received as margins. Subsequently, and without the knowledge of the plaintiff, they sold these stocks, and thereby converted them to their own use. Without going into the details of the facts, it is evident that the plaintiff might have sued them in an action on contract, charging them with the money advanced and with the value of the stock; or in an action of trover, based upon their conversion. For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that, as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy.

The judgment of the Supreme Court of Illinois is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.[5]

BROWN & ADAMS v. UNITED BUTTON CO.

149 Fed. 48, 79 C. C. A. 701

(Circuit Court of Appeals, Third Circuit. November 10, 1906)

ARCHBALD, District Judge. The question is whether a claim for unliquidated damages, resulting from injury to the property

5—See Clarke v. Rogers, 228 U. S. 534, 543, *et seq.*; Reynolds v. N. Y. Trust Co., 188 Fed. 611, 615.

of another, not connected with or growing out of any contractual relation, is provable in bankruptcy. The appellants, Brown & Adams, are wool dealers in Boston, Mass., and have a warehouse there for the storage of wool which adjoins a building formerly used for a number of years by the United Button Company, bankrupt, as a factory; the two being simply separated by a party wall. Wool in storage needs to be kept at a cool and even temperature; and the charge is that, by reason of excessive heat from the furnaces of the button company which penetrated through the party wall, the wool of the appellants was dried out and damaged, losing weight and depreciating in price in consequence, to the extent of some $12,000. The button company was put into bankruptcy in August, 1904. Just when, prior to this time, the damages which are claimed accrued, is not made clear, but it is fair to assume that some at least was within the year, and the case will be disposed of upon that basis. Claiming that the button company is liable for this loss, treating it either as the result of negligence or nuisance, proof is sought to be made for it against the estate, liquidation of the damages being suggested through the medium of a bill in equity, now pending in the Superior Court for the county of Suffolk, Mass., brought by the appellants against the button company and its trustee. The claim was rejected by the District Court without passing upon the merits, upon the ground that it was not provable, and the propriety of that ruling is the question here.

Bankruptcy is supposedly concerned only with commercial matters, and was early confined to traders. Loveland, § 3. And, while it has been gradually extended and enlarged, the original idea has not been altogether departed from. Its purpose is to free a person from his debts or to subject him to proceedings on account of them. This may not be controlling, but it is suggestive; and a construction which goes outside of it has certainly to be justified.

By the bankruptcy act at present in force it is provided:

"§ 63. Debts Which May Be Proved.—a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then

payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments." Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

This to all intents is complete in itself, being given up to an enumeration and specification of the debts which may be proved. It is, however, further provided in this same section:

"b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

As contradistinguished from the paragraph which precedes it, this subsection seems to be concerned with a mere matter of procedure, directing how a claim which is open and unsettled—such for instance as one "(4) founded upon an open account, or upon a contract express or implied" precedently specified—may be liquidated and made certain. And whether taken by itself, or with reference to the immediate context, this is the natural, if not the only, construction to be given to it.

It is contended, however, by the appellants, that it is in fact intended to cover an additional and distinct class of claims, the whole section, as indicated by its title, being devoted to the general subject of debts which are provable; the one subsection (a) dealing with those which are of a fixed and more or less absolute character, such as judgments, costs, bills, notes, and accounts, and the other (b) with those which require to be liquidated, such as damages for torts; the word "debt," as defined by the act—§ 1 (11)—including a "demand or claim," and being thus broad enough to embrace both. This construction, moreover, is made necessary, as it is said, in order to bring the section into harmony with other parts of the act.

To the contrary of this, however, it is declared in Dunbar v.

Dunbar, 190 U. S. 340, 350, 23 Sup. Ct. 757, 761, 47 L. ed. 1084, that:

"This paragraph, 'b,' * * * adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of § 63*a*, to be liquidated as the court should direct."

It is true that this is somewhat aside from the immediate question before the court, which was whether a discharge in bankruptcy operated to release a contingent liability, such as an annuity, which a husband upon his divorce agreed to pay to his wife for the support of herself and their minor children. But it is not to be assumed that a construction deliberately announced in this way was not considered by the whole court, or went out unadvisedly, so as to stand as mere dictum. The law is as it is declared to be by the Supreme Court speaking by one or the other of its judges, and is not to be put aside upon any such suggestion, except as there is no other alternative. That the question is still open and undisposed of, however, notwithstanding what is so held, is confidently affirmed upon the strength of Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. ed. 147, where in discussing this section of the act it is said:

"Paragraph 'a' * * * includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph 'b,' two constructions are possible: It may relate to all unliquidated demands, or only to such as may arise upon such contracts, express or implied, as are covered by paragraph 'a.'"

It is upon the latter expression that the appellants particularly rely. But whatever encouragement, standing by itself, it may seem to lend, the court is careful to add:

"Whether the effect of paragraph 'b' is to cause an unliquidated claim, which is susceptible of liquidation, but is not literally embraced by paragraph 'a,' to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provisions of paragraph 'a' as one 'founded upon an open account, or upon a contract express or implied,' and might have been proved under § 63*a* had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate."

Taking it altogether, therefore, this utterance does not seem to carry us very far.

Assuming, however, that the question is an open one, let us see to what an independent consideration of it leads. The argument is that the right to prove must, in justice, be coextensive with the release to be obtained, and that, as it is plainly provided (§ 17) that the bankrupt shall be discharged from liability for all but certain excepted torts, it must be that all which are not so excepted are entitled to come in. As said by Mr. Justice Brown, in Crawford v. Burke, *supra:*

"It certainly could not have been the intention of Congress to extend the operation of the discharge under § 17 to debts that were not provable under § 63*a*."

The one section, according to this, is to be read in the light of the other, and that construction adopted which will consist with both.

Care is to be taken, however, in this comparison, not to reverse the order of importance in which they are to be considered. Nor in case of conflict to press the argument too far. If any section is controlling in this regard, it is the section which declares what debts are provable, and not the contrary. It is not so much, in other words, that a tort of the character which we have here is discharged by the one, as that it is made provable by the other, that gives it a standing against the estate. Even if the one were true of it and not the other, the right to come in would not be established, it being possible that there is a lapse in the law in this respect, the result of imperfect adjustment, upon amendment; a conclusion to be avoided, if it can be, but not at the expense of that part of the statute which must necessarily govern.

The strength of the argument in favor of claims for torts being provable, as is thus intimated, resides in the section with regard to discharges, where it is provided:

"§ 17. Debts not Affected by a Discharge.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt,

unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

As originally passed, instead of the word "liabilities," in clause 2, were the words "judgments in actions"; and after the word "for" were the words "frauds, or"; while nothing whatever was said as to alimony, maintenance, seduction, or criminal conversation. Claims grounded in fraud or the other causes of action specified had, therefore, as the law then stood, to be reduced to judgment in order to be saved from the effect of a discharge. Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. ed. 147; Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. ed. 340. The reason why this distinction was made is not clear, but it was probably, as suggested, in order to avoid the temptation to claimants to try and bring their cases within the exception, and to do away with the necessity for going into conflicting evidence in order to do so. Other cases of false pretense, misrepresentation, or willful and malicious injury, not so protected, were thus apparently left to be released by a discharge. And, as the distinction is now removed by the substitution of the word "liabilities" for "judgments," and the exception still further enlarged by the addition of seduction and criminal conversation, the argument is that all torts not so excepted, being left to be operated upon by a discharge, must have the reciprocal right to come in and be proved against the estate, if a manifest inconsistency, not to say injustice, is to be avoided. It must be confessed that this is not easy to meet. Seduction and criminal conversation are torts, pure and simple, and cannot be resolved away, like some, as being possibly tied up to a contract. And if it was considered necessary to except these by name, without which a discharge would release them, why are not other torts such as the one which we have here, growing out of negligence or nuisance, in the same situation? Slightly modifying the words of Mr. Justice Brown in Crawford v. Burke, *supra:* If no tort could be made the basis of a provable debt, why were certain torts excepted? Nor is the force of this weakened by the fact that, according to the decision in Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. ed. 754, criminal conversation, at least when reduced to judgment, was already taken care of, the same as maintenance and alimony, as to which, to that extent, the amendment of 1903 may be regarded as merely

declaratory. Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. ed. 1009; Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. ed. 1084; Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. ed. 390.

It is to be observed, however, that the construction which is contended for grows out, not of positive, but exceptive, legislation. It is not declared what debts shall be released, but what shall not be. And they must, in terms, be first provable, in order to be excepted, and not the contrary. The only difficulty that is experienced, also, is with regard to the changes introduced by the amendment of 1903, in part, as we have seen, unnecessary; as to which, it may well be that in providing, out of extra caution, that certain things should not be discharged, care was not taken to note the possible effect upon other parts of the law, or to adjust them to this, producing the present want of harmony. For, after all has been said, it must be recognized that there is a want of harmony between these two different parts of the statute, not, indeed, as originally enacted, but now, as they stand, after amendment. The one section (17) with regard to the effect of a discharge assumes that torts generally are provable and proceeds accordingly; while the other (63) makes no provision for anything of the kind, except by a construction which it is safe to say was not in contemplation when it was passed, and cannot consistently be read into it. The true view to be taken of it has been already indicated. The first of the two paragraphs into which it is divided is given up to an enumeration of the debts which are entitled to be proved against the estate, among which is to be found everything in the way of a fixed obligation, or which, as being of a commercial character, a bankrupt could expect to be relieved from; and, complete in itself, it is not to be added to. The other paragraph plainly has to do with a mere matter of procedure; how unliquidated claims founded upon open account or contract, specified in the preceding paragraph, may be liquidated or settled. Nor can it properly be made to serve any other purpose. Argument may amplify this, but cannot make it clearer. And as so interpreted a claim for damages, such as the one before us, is not included among debts which are made provable. This, if not the latest deliverance of the statute (the amendment of 1903 having to be accorded that position), as the one devoted specifically to the subject, must control. 26 Am. & Eng. Encycl. Law (2d ed.) 68.

It may be that the conclusion which is so reached, if it is to

abridge correlatively the effect of a discharge, is not altogether favorable to the bankrupt, who is interested in being relieved from his liabilities to the fullest extent possible. But this question is not before the court, and it will be time enough to meet it when it is.

There was no error, therefore, in the rejection of the appellants' claim, and the judgment is affirmed.

GRAY, Circuit Judge (concurring). While concurring in the result reached by the majority of the court, and to some extent in the reasoning employed in reaching that result, I am constrained to think that the *ratio decidendi* of the court below is that upon which our decision should rest. Without attempting to amplify or paraphrase the opinion of the learned judge of that court (In re United Button Co. [D. C.] 140 Fed. 495), it is sufficient, in referring to § 17, to again note that the debts which "a discharge in bankruptcy shall release," are such debts only as are provable under § 63, and the debts which are excepted from discharge, being among others liabilities for certain torts, are also necessarily provable debts. If it be said that "wilful and malicious injuries to the person or property of another," and "seduction" or "criminal conversation" are torts, pure and simple, and as such incapable of liquidation and proof under § 63, it may be replied that liabilities for such torts, when reduced to judgment, are provable, and come within the classification of § 17*a* (2) as "liabilities" for certain torts. Be this as it may, it is true, however, that even if, out of abundant caution, certain of the torts which are included in the excepting clause could not have been liquidated and proven under § 63, still the fact that the excepting clause in this respect overlaps provable debts and includes some that are not provable, does not nullify the qualifying effect of the word "provable," as limiting the debts to be excepted, as well as these which are discharged by § 17, and, as said in the majority opinion of this court, cannot serve to abrogate or qualify the description of provable debts as contained in § 63.

In this view, the two sections, 63 and 17, are not necessarily irreconcilable.[6]

6—As to provability of claim for profits for infringement of patent see In re Boston & Fairhaven Iron Works, 23 Fed. 880. But *cf.* In re Pavement Co., 156 Fed. 583; In re Awning Hood Co., 187 Fed. 611.

C. Contract Claims

1. Unliquidated Claims

GRANT SHOE CO. v. LAIRD CO.

212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. 332

(United States Supreme Court. February 23, 1909)

Mr. Justice HOLMES delivered the opinion of the court:

This case comes up on a certificate concerning the jurisdiction of the District Court on the following facts: The W. M. Laird Company filed a petition in bankruptcy against the Frederic L. Grant Shoe Company, alleging acts of bankruptcy, and setting up a claim for $3,732.80 for the breach of an express warranty of shoes sold to it by the latter. The shoe company answered, denying the foregoing allegations, and denying that the claim alleged was a provable claim. The case coming on to be tried before a jury, it moved the court to dismiss the proceeding for want of jurisdiction. The motion was denied, and insolvency and acts of bankruptcy being admitted, the claim was liquidated at $3,454, the shoe company offering no evidence. The shoe company was adjudged a bankrupt, and, at the same time, the judge certified that the jurisdiction of the court to make such an adjudication on a claim for unliquidated damages was the only question in issue. Afterwards this writ of error was brought, the taking of jurisdiction being the only error assigned.

* * * * * * * * *

Coming to the question certified, we are of opinion that the decision of the courts below was right. The argument to the contrary is based on the letter of the statute, and is easily stated and understood. By § 59*b* petitions to have a debtor adjudged a bankrupt may be filed only by creditors who have provable claims. By § 63*b*, "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." The word "thereafter" shows, it is said, that they are not yet proved to exist when merely presented and sworn to. Therefore it does not yet appear that there is any foundation for the proceeding, in the requisite amount or even the existenee of the claim. But there must be a proceeding in court before a liquidation can take place, and, therefore, the claim cannot be liquidated until a proceeding is started in

some other way. In short, the claim upon which the petition is based must be provable when the petition is filed, and this claim was not provable then, since, by the express words of the act, it had to be liquidated before it could be proved.

On the other hand, by the equally express words of § 63*a*, among the debts that may be proved are those founded upon a contract, express or implied. Again, by § 17, the discharge is of all "provable debts" with certain exceptions, and it would not be denied that this claim would be barred by a discharge. Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493. If the argument for the plaintiff in error is sound, a creditor for goods sold on a *quantum valebant* would be as badly off as the petitioner, and both of them might be postponed in reducing their claims to judgment until it was too late. The intimation in Tindle v. Birkett, *supra*, and Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, are adverse to such a result. The whole argument from the letter of the statute depends on reading "provable claims" in § 59*b* as meaning claims that may be proved then and there when the petition is filed. But, if it can be seen then and there that the claims are of a kind that can be proved in the proceedings, the words are satisfied; and further, no reason appears why a liquidation may not be ordered on the filing of the petition, to ascertain whether it is filed rightly or not.

It is said that an unfounded claim of this sort might be used as a weapon to enforce an unjust demand or to make a solvent but struggling debtor bankrupt. Re Big Meadows Gas Co., 113 Fed. 974. But an unjust demand may be made for a liquidated sum, also, and we have mentioned the injustice on the other side. Again, it has been suggested that a cause of action for a breach of warranty really is for deceit, and sounds in tort, claims for torts not being mentioned among the "debts which may be proved" in § 63*a*. Re Morales, 105 Fed. 761. No doubt at common law a false statement as to present facts gave rise to an action of tort, if the statement was made at the risk of the speaker, and led to harm. But ordinarily the risk was not taken by the speaker unless the statement was fraudulent; and it was precisely because it was a warranty,—that is, an absolute undertaking by contract that a fact was true,—that, if a warranty was alleged, it was not necessary to lay the *scienter*. Schuchardt v. Allen, 1 Wall. 350, 17 L. ed. 642; Norton v. Doherty, 3 Gray, 372, 63 Am. Dec. 758. In other words, a claim on a war-

ranty, as such, necessarily was a claim arising out of a contract, even if, in case of actual fraud, there might be an independent claim purely in tort.

Judgment affirmed.[7]

2. *Contingent Claims*

MOCH v. MARKET ST. NAT. BANK

In re GERSON

107 Fed. 897, 47 C. C. A. 49

(Circuit Court of Appeals, Third Circuit. April 22, 1901)

ACHESON, Circuit Judge. The question presented by this appeal is whether the liability of a bankrupt indorser of commercial paper, whose liability did not become absolute until after the filing of the petition in bankruptcy, may be proved against his estate after such liability has become fixed, and within the time limited for proving claims. By the first section of the bankrupt law,—the act of July 1, 1898,—it is declared that the word "debt," as used in the act, shall include "any debt, demand, or claim provable in bankruptcy." § 63 declares what debts of the bankruptcy may be proved and allowed against his estate, and ranges the provable debts in five subdivisions, numbered from 1 to 5, inclusive. For present purposes we need quote only two of those subdivisions, namely:

"(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;" "(4) founded upon an open account, or upon a contract express or implied."

Clearly the liability of an indorser is within the very words of this fourth subdivision. As was said by the Supreme Court in Martin v. Cole, 104 U. S. 30, 37, 26 L. ed. 647, the contract created by the indorsement of commercial paper is an "express

7—As to provability of claim for damages for breaches of covenants for title in deed of land see Riggin v. Magwire, 15 Wall. 549; Reed v. Pierce, 36 Me. 455.

contract," and "its terms are certain, fixed, and definite." The indorser's engagement is to pay a sum certain at a fixed date, to wit, the amount of the bill or note at its maturity, if it is not paid upon due presentment by the party primarily liable, upon due notice of its dishonor being given to the indorser. If it can be affirmed that such an unmatured liability is not a "debt," in a technical sense, certainly it is a "demand" or "claim," and comes, it seems to us, within the scope of the fourth subdivision of § 63 of the act. The primary purpose of the bankrupt act was to relieve insolvent debtors from their pecuniary liabilities, and to secure ratable distribution of their estates among their creditors. It is not, then, to be lightly believed that congress intended to exclude from the operation and benefits of the act unmatured indorsements of commercial paper, which in every commercial community so often constitute a large proportion of the indebtedness of failing debtors. Of course, if not provable, such liabilities are not discharged. Now, a construction leading to results so foreign to the general purpose of the law is not to be adopted unless plainly required by the language of the act. We cannot see that such an interpretation is demanded by anything contained in the act. The first and fourth subdivisions of § 63 are distinct provisions, and are, we think, independent of each other. We are unable to agree to the proposition that subdivision 1 qualifies, and is to be carried down and read into, subdivision 4. On the face of the act they are distinct. Moreover, reasonable effect can be given to both by treating them as separate and independent clauses. There are well-known instruments—for example, surety bonds—under which the liability is contingent on future defaults, and where the amount of liability is wholly uncertain, depending on the nature of the default. To instruments of this character, where the liability is remote and is uncertain in amount and otherwise, subdivision 1 is fairly referable; but we think, with the court below, that the contract created by the indorsement of commercial paper is not governed by that subdivision, but falls within subdivision 4, which embraces debts, claims, or demands founded upon contracts, express or implied. Accordingly the order of the District Court allowing the claim of the Market Street National Bank against the estate of the bankrupt, Joel J. Gerson, is affirmed.

PHILLIPS et al. v. DREHER SHOE CO.

112 Fed. 404

(District Court, M. D. Pennsylvania. January 9, 1902)

ARCHBALD, District Judge. On September 16, 1901, H. L. Phillips and nine others, all of Selins Grove, Pa., filed a creditors' petition against W. A. Dreher and Floyd A. Wetherby, trading as the Dreher Shoe Company, of the same place, to have them declared bankrupts on the ground that they were insolvent, and had made an assignment for the benefit of creditors. In the petition they set forth that they were creditors of the said company having provable claims amounting in the aggregate to $1,000, each of the petitioners being an indorser or surety upon one of a series of ten notes for $100 each, signed by the Dreher Shoe Company, dated May 1, 1901, and payable in one year from date; these notes having been discounted by the First National Bank of Selins Grove, and then held by it. On this showing a subpoena and order to show cause were issued, returnable October 26th, and duly served. No response was made at the return day by the alleged bankrupts, but on October 28th Fr. Otto Muller and two other creditors came in and obtained a rule to show cause why the proceedings should not be dismissed because the petitioners did not hold provable claims, and in this, on November 19th, the alleged bankrupts and two other creditors joined. A copy of one of the notes—which are all alike—was produced at the argument, and shows that the petitioners are not indorsers, but joint makers with the Dreher Shoe Company. But, however that may be, they were at the time of filing the petition, and still are, sureties, and no more. The bank holds the notes, by which they, as well as the principal debtors, are bound; and, while it declines to move, and has at the same time notified the sureties that they will be looked to, nothing has been done to enforce the obligations, which are, in fact, not yet due; nor have the sureties paid or been called upon to pay them. Under such circumstances it is difficult to see how the proceedings can be maintained. On each of the notes referred to the debt or claim is that of the holder of the obligation to whom it is due, the surety having no direct interest in it, being only secondarily or contingently liable. He may pay the debt, and become the holder, with all the rights incident thereto; but unless and until he does he occupies a secondary and subordinate position. The

right to move is, in the first instance, lodged in the one who is actually possessed of the obligation of the debtor. The surety has, however, an interest to protect, which the bankruptcy law recognizes; and, in order to accord him what it considers a proper measure of relief, it provides in § 57f that "whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor." No one has any rights under the bankrupt law outside of what it gives him, and those of a surety are defined by this section, beyond which he cannot go. By it he has the right to prove, in case the principal creditor fails to do so. He does not, indeed, have to discharge the obligation in order to have this privilege, but, in case he does do so, in whole or in part, he becomes entitled to that extent to the right of subrogation, and, in any event, when he proves the debt, he proves it not in his own name, but in that of the original holder. In re Christensen, 2 Nat. Bankr. N. 1094. The particular point to be noticed in the present connection with regard to the position of the surety is that he only has a right to prove in case the principal creditor fails to do so, and the latter cannot be said to fail until he has had an opportunity and passed it by, which can only occur when, by proceedings duly instituted, the estate of the debtor has been drawn into the bankruptcy court to be there administered, and all parties have been called upon to make known their claims. When that has been done, and he neglects to act, the surety, so as not to be prejudiced, may himself prove the debt in his stead. This, so far as I can see, is all the relief given by the act, and, whether adequate or inadequate, it must suffice. It follows from this that at the outstart the surety who has not taken up the obligation has no provable claim, and therefore has no standing to petition. It is not provided in the law that at that stage he can intervene, either in his own name or in the name of the creditor, and institute involuntary proceedings. All that he can do is to prove the claim later on, if the creditor fails to do so after somebody else has moved. This is the view taken by In re Riker, 18 Nat. Bankr. R. 393, Fed. Cas. No. 11,833, a case arising under the act of 1867, where the provisions were fully as favorable to the surety as here. Two of the petitioners there were indorsers on notes of the debtor, which had been turned over for value to a

third party, in whose hands they had been dishonored at maturity, and the indorsers notified that they would be held; and, notwithstanding that their liability was so fixed, it was decided that they were not entitled to petition. "It seems," says Choate, J., "the notes objected to were not demands due absolutely to the petitioning creditors, but on which, in case the holders should not prove, they could make proof * * * in the creditor's name or otherwise. The holder is the creditor, who, in the first instance, has exclusively the right to prove; and the liability of the maker to the indorsers is only contingent in its nature, and his claim is only provable in a certain event, which cannot happen until after the adjudication, viz., the neglect of the holder to prove." This is squarely to the point, and confirms my own reading of the law. Nor do I find anything to contravene it in Mace v. Wells, 7 How. 272, 12 L. ed. 698, or In re Nickodemus, 3 Nat. Bankr. R. 230, Fed. Cas. No. 10,254, relied on by counsel for the petitioners. I am forced, therefore, to conclude that the sureties had no standing to institute the present proceedings, which must accordingly fall.

The rule is made absolute, and the petition and all proceedings thereunder are dismissed.[8]

SWARTS v. SIEGEL et al.

117 Fed. 13, 54 C. C. A. 399

(Circuit Court of Appeals, Eighth Circuit. July 21, 1902)

SANBORN, Circuit Judge. These are appeals from the decree of the District Court directing that the claim of F. Siegel & Bro. against the estate of the Siegel-Hillman Dry Goods Company, a corporation and a bankrupt, be disallowed unless the claimants repay to the trustee the sums of $14,600 and $5,219.63, which the court held to constitute preferences given to the claimants which they were required to surrender under § 57*g* of the bankrupt act of 1898. The claimants appealed from this decree because it required them to restore the $14,600 and the $5,219.63 as a condition of the allowance of their claim. The trustee appealed from it because it did not require the claimants

8—See Insley v. Garside, 121 Fed. 699; In re Dr. Vorhees Co., 187 Fed. 611, 629, 633.

to repay to him $20,000 more as a condition of the allowance of their claim.

1. * * * Four months prior to February 6, 1900, when the dry goods company was adjudicated a bankrupt, the Fourth National Bank of St. Louis held the promissory notes of this corporation for $25,000 upon which the claimants, F. Siegel & Bro., had indorsed their names before the notes were discounted for the purpose of giving them credit, so that they became accommodation makers thereon. Within four months preceding the filing of the petition in bankruptcy, the dry goods company, while it was insolvent, paid to the bank $14,600 on some of these notes, and the bank innocently received these payments. On December 30, 1899, when the petition in bankruptcy was filed, the bank held a claim against the corporation for $10,600 and interest upon some of these notes which had been indorsed by the claimants, and for $35,000 upon other notes of the bankrupt which had not been so indorsed. After the adjudication in bankruptcy Siegel & Bro. paid $10,535.46, the amount which remained due upon some of these notes which they had indorsed, and one of the items of their claim against the estate of the bankrupt is the amount which they so paid. Their claim consists of various items aggregating about $35,000. The court below directed the disallowance of their claim unless they refunded the $14,600 which the bank had received on the notes which Siegel & Bro. had indorsed.

* * * * * * * * *

[After discussing the question of subrogation, the court continued]:

There is another reason why Siegel & Bro. are not entitled to the allowance of their claim unless the $14,600 is repaid. It is that they were creditors of the dry goods company when that amount was paid to the bank. A creditor is "one who gives credit in business transactions." Cent. Dict. p. 1341, tit. "Creditor." Siegel & Bro. gave credit to the dry goods company in a business transaction. They signed its notes, became absolutely liable to pay them, and thereby gave it credit. If they had simply indorsed them, and thus become only contingently liable, the same result would have followed. One who loans his credit to another is as much his creditor as one who loans his money to him. A creditor is "one who has the right to require the fulfillment of an obligation or contract." Bouv. Law Dict. p. 435. An indorser, an accommodation maker, or a surety on an obligation

of a debtor has a right to require the fulfillment of the obligation or contract of that debtor. "'Creditor' shall include any one who owns a demand or claim provable in bankruptcy." § 1, subd. 9, Bankr. Law 1898. "Debts of a bankrupt may be proved and allowed against his estate which are (1) a fixed liability * * * (4) founded upon an open account or upon a contract express or implied." § 63. Provision is here made for the proof of two classes of debts,—those which evidence fixed liabilities of the debtor, and those founded upon contracts which evidence contingent or uncertain liabilities. The debt of a principal debtor to his indorser, his accommodation maker, or his surety before the latter has paid the obligation is a contingent liability founded upon contract, and falls directly within the terms and meaning of subdivision 4 of this section. To make assurance doubly sure, however, congress expressly provided that "whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." § 57*i*. An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a person whose individual undertaking secures the claim against the bankrupt estate of the holder of that obligation, and by the terms of this section he may prove that claim whenever the creditor fails to do so. The language is broad, comprehensive, and without exception. He has the same right to prove it before as after he discharges the obligation in whole or in part, and if he is an indorser he has the same right to make his proof before as after his liability ceases to be contingent and becomes fixed. The last clause of the paragraph, "and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor," neither limits the class who may prove their claims under this paragraph to those who have discharged their undertakings entirely or partly, nor in any way restricts the class which the earlier portion of the paragraph permits to establish their demands against the estate of the bankrupt. On the other hand, it adds emphasis and certainty to the patent meaning of the earlier portion of the paragraph that the indorser or surety may prove the claim in the name of the holder of the bankrupt's obligation whenever the creditor fails to do so, and before, as well as after, the surety discharges his undertakings, because, while such

proof in the name of the creditor would send the dividends to the original holder of the claim, the latter portion of the paragraph adds the provision that if the surety discharges his undertaking he shall then be subrogated to the rights of the original holder, and hence to the right to receive the dividends. §§ 57*i* and 63 (4) were obviously intended to prevent the injustice that would be inflicted upon indorsers and sureties for the bankrupt whenever the holders of their obligations should elect to make no proof of their claims against the bankrupt estates, and to rely exclusively upon the liabilities of the sureties if the latter were not allowed to prove the claims. These sections have accomplished their purpose. The remedy they provided is as broad and comprehensive as the evil which they were passed to prevent, and an indorser or a surety has a provable claim against the estate of a bankrupt, and is his creditor under the act of 1898 before, as well as after, his liability becomes fixed.

An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a creditor under the act of 1898, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract within four months before the filing of the petition for adjudication in bankruptcy will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt unless the amount so paid is first returned to that estate. Bankr. Act 1898 (30 Stat. 544) §§ 1 (9), 57*i*, 63*a* (1, 4); Landry v. Andrews, 6 Am. Bankr. R. 281, 284, 48 Atl. 1036; In re Rea, 82 Iowa, 231, 239, 48 N. W. 78; Cutler v. Steele, 85 Mich. 627, 632, 48 N. W. 631; Dunnigan v. Stevens, 122 Ill. 396, 401, 404, 13 N. E. 651, 3 Am. St. Rep. 496; Ahl v. Thornor, 1 Fed. Cas. 220, 222 (No. 103); Sill v. Solberg (C. C.), 6 Fed. 468, 474, 477; Scammon v. Cole, 21 Fed. Cas. 627, 628 (No. 12,432); Cookingham v. Morgan, 6 Fed. Cas. 454, 455 (No. 3,183); In re Gerson (D. C.), 105 Fed. 891; Bartholow v. Bean, 18 Wall. 635, 21 L. ed. 866; In re Waterbury Furniture Co. (D. C.), 114 Fed. 255.

This conclusion has not been reached without a careful comparison of the pertinent provisions of §§ 38 and 39 of the bankrupt act of 1867 (14 Stat. 535, 536), and a thoughtful perusal of the opinions in Singer v. Sloan, Fed. Cas. No. 12,899; Thomas v. Woodbury, Fed. Cas. No. 13,916; Bean v. Laflin, Fed. Cas. No. 1,172; Corbett v. Woodward, Fed. Cas. No. 3,223; and

Swarts v. Siegel (C. C.), 114 Fed. 1001. This portion of our labors, however, has been fruitless chiefly for the reason that the language of the act of 1898 upon this subject appears to us to be too plain for exegesis or interpretation. Attempted judicial construction of the unequivocal language of a statute or of a contract serves only to create doubt and to confuse the judgment. There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction. Knox Co. v. Morton, 15 C. C. A. 671, 673, 68 Fed. 787, 789; Railway Co. v. Sage, 17 C. C. A. 558, 565, 71 Fed. 40, 47; U. S. v. Fisher, 2 Cranch, 358, 399, 2 L. ed. 304; Railway Co. v. Phelps, 137 U. S. 528, 536, 11 Sup. Ct. 168, 34 L. ed. 767.

The accepted and customary definition of the term "creditor," its definition in the act of 1898, the clear terms and patent meaning of the provisions of that act upon the subject under discussion, the better reasons and the greater weight of authority, all converge to establish and sustain the conclusion that an indorser, an accommodation maker, or a surety for a bankrupt is his creditor; and the result is that whether we are governed by the general definition of the term, or by the specific provisions of the statute, Siegel & Bro. held a provable claim against the estate of the dry goods company, and were its creditors when the $14,600 was paid to the bank; and as that payment depleted the estate, and its enforcement will enable Siegel & Bro. to obtain a larger percentage of their claim out of the estate of the bankrupt than other creditors of the same class will receive, their claim against the estate cannot be allowed unless the $14,600 is first returned to the trustee.

* * *

The result is that the claim of F. Siegel & Bro. against the estate of the bankrupt cannot be lawfully allowed unless before its allowance * * * the sum of $14,600 is paid back to the trustee either by the Fourth National Bank of St. Louis or by Siegel & Bro. * * * The decree which is challenged by these appeals is reversed, and the case is remanded to the court below, with directions to enter orders and take further proceedings herein not inconsistent with the views expressed in this opinion and in the opinion in the case of Swarts v. Fourth Nat. Bank, which is filed herewith.

GODING v. ROSCENTHAL

180 Mass. 43, 61 N. E. 222

(Supreme Judicial Court of Massachusetts. October 18, 1901)

BARKER, J. By the execution of the bond of March 29, 1898, to Aug, in which the present plaintiff was a surety for the present defendant, the latter incurred an obligation to the present plaintiff to reimburse him any amount which he might be compelled as surety to pay upon the bond. This obligation was in force when, on February 13, 1900, the present defendant's petition in bankruptcy was filed. It was an obligation founded upon an implied contract, and it was evidenced by an instrument in writing, and in one sense it was a fixed liability. But no debt was absolutely owing at the time of the petition. The obligation was contingent upon the happening of a breach of the bond and a payment by the surety. The payment by the surety was not until June 12, 1900, and there seems to have been no breach of the bond before that date. Therefore neither the obligee in the bond nor the surety could prove in the bankruptcy proceedings a claim founded upon the bond, unless merely contingent claims are provable under the bankruptcy act of 1898. The ultimate decision of that question is yet to be made by the Supreme Court of the United States. But in Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, this court assumed that such claims were not provable under the act, and we follow that view in the present case.

Exceptions sustained.[9]

HAYER v. COMSTOCK

115 Iowa 187, 88 N. W. 351

(Supreme Court of Iowa. December 20, 1901)

GIVEN, C. J. 1. The agreed statement of facts is as follows: "On May 26, 1900, the following agreed statement of facts was filed with the clerk of the Wright County District Court, to-wit: 'It is hereby agreed by and between the plaintiff and the defendant in the above-entitled action that on December 2, 1893,

9—Smith v. McQuillin, 193 Mass. 289; Ogilby v. Munro, 101 N. Y. Supp. 753, 52 Misc. 170; R. P. Williams & Co. v. U. S. Fidelity, etc., Co., 11 Ga. App. 635, 75 S. E. 1067, *acc.*

the plaintiff, C. F. Hayer, signed the note attached to this statement as surety for the defendant; that the defendant failed and neglected to pay said note; that on April 1, 1899, the plaintiff had to, and did, pay the full amount of said note, to-wit, $193.66, to the State Bank of Eagle Grove, Iowa, and that no part of said amount has been repaid him; that in December, 1898, the defendant filed his petition in the District Court of the United States for the Northern District of Iowa, and was duly and legally adjudged a voluntary bankrupt under the acts of Congress relating to bankruptcy; that said note was duly scheduled in said bankruptcy proceedings as one of defendant's liabilities; that in such schedule the State Bank of Eagle Grove, Iowa, payee of said note, was named as the owner and holder thereof, and was duly notified of each step in said bankruptcy proceedings as required by law; that in December, 1898, plaintiff, C. F. Hayer, was informed by others of the pendency of said bankruptcy proceedings, and had actual knowledge thereof after the filing of the petition, although he was not listed as a creditor therein; that on April 3, 1899, this defendant was by the judgment of said United States Court discharged from all his debts; that a certificate of such discharge was issued by said court and delivered to defendant, a copy of which certificate is attached to defendant's answer herein, and is hereby made a part of this statement of facts.'" The certificate of discharge is: "From all debts and claims which existed on the 6th day of December, A. D. 1898, on which day the petition for adjudication was filed by him, except such debts as are by law excepted from the operation of such discharge in bankruptcy." This claim is not of the class excepted by law. The plaintiff claims that as he had not, as surety, paid the note at the time the petition for adjudication in bankruptcy was filed, there was no debt then due to him, and he could not have his claim scheduled against the bankrupt's estate; that he had no provable claim; and that the discharge does not apply to his claim; while the defendant contends that under the facts the discharge does apply, and that therefore the court erred in rendering judgment against him.

§ 17 of the bankruptcy law of 1898, under which this proceeding was had, provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts," except certain debts of which this is not one. § 63, in specifying debts which may be proved and allowed, names the following, among

others: "(1) A fixed liability as evidenced by judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest. * * * (4) Founded upon an open account, or upon a contract express or implied." § 16 provides that the liability of the surety for a bankrupt shall not be altered by the discharge of such bankrupt, and paragraph "i" of § 57 is as follows: "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." Paragraph 4 of order No. 21 of "General Orders and Forms in Bankruptcy Established by the Supreme Court of the United States" (18 Sup. Ct. vii.) is as follows: "(4) The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish the *pro tanto* original debt."

This debt was a fixed liability evidenced by an instrument in writing, and absolutely owing by the defendant at the time of the filing of the petition in bankruptcy, and therefore might be proved against the estate as it was. It is the fact that the bankrupt absolutely owed this fixed liability, evidenced in writing, at the time of the filing of the petition, that made it provable, regardless of the person to whom it was owing. If the creditor had failed to prove the claim, the plaintiff could have done so in its name, not because the debt was then due to him, but because it was a fixed liability, evidenced in writing, and absolutely owing by the defendant. Being proved as it was by the creditor, it was not required that the surety should take any further steps. We do not overlook the distinctions that exist as between liability of the debtor to the creditor and his liability to his surety, but we emphasize the fact that it was the fixed liability, evidenced in writing, "absolutely owing" by the defendant, that made this a provable claim against his estate. Said paragraphs in § 57 and in the general orders of the Supreme

Court recognize the right of the surety to protect himself before payment, and when his liability is contingent, and to share in the dividends of the estate after payment. Mace v. Wells, 7 How. 275, 12 L. ed. 698, decided under the bankruptcy law of 1841, is quite identical in its facts with this case, and it was there held that the plaintiff was not entitled to recover. The fourth section of the law provided that "a discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt which are provable under this act," etc. By the fifth section, "endorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right whenever debts and claims become absolute to have the same allowed them," etc. The court says: "Wells, as surety, was within this section, and might have proved his demand against the bankrupt. He had not paid the last note, but he was liable to pay it as surety, and that gave him a right to prove the claim under the fifth section. And the fourth section declares that from all such demands the bankrupt shall be discharged. This is the whole case. It seems to be clear of doubt." See, also, Crafts v. Mott, 4 N. Y. 604. We may say as to these sections, and the sections of the present law quoted above, as is said in the recent case of In re Dillon (D. C.), 100 Fed. 627,—that "the provisions of the two acts, though quite differently worded, yet reach in most respects the same results." Under both cases the surety can get nothing by way of dividend unless he pays the original debt, in whole or in part. If he discharges the whole debt, then, under the clause above quoted of § 19 of the Acts of 1867, and under § 57, par. "i," of the bankrupt act of 1898, he stands in the place of the original creditor, or is subrogated to his rights. This is true whether the payment be made before or after the bankruptcy. Plainly, the words "if he discharge such undertaking," in § 57, par. "i," are not limited to the time before adjudication. In this Case of Dillon it is said "That if Claffin, the creditor, had proved the original debt to him at the time of the bankruptcy, as he might ordinarily have done, McGuire [the surety], on his subsequent payment of a part of the Claffin's debt, would be subrogated to that extent to Claffin's rights. It follows, also, that, since Claffin has not proved the debt, McGuire must, if he wishes to prove, do so in Claffin's name. As he has not done

this, his claim must be disallowed, without any question of set-off, and the referee's judgment is therefore affirmed." In this case the creditor had proved the claim, and nothing further was required of the surety to entitle him to share in the dividends in case of payment by him. Defendant cites In re Burka (D. C.), 104 Fed. 326, which holds that the rights of creditors generally relate to the date of the filing of the petition, and that a claim for legal services not then in existence cannot be proved against the estate, and is not released by discharge. As already said, this was a fixed liability, evidenced in writing, and absolutely owing by the defendant at the time of the filing of the petition; and these facts render it a provable claim, regardless of whether, by transfer or otherwise, the person to whom he owed it was changed or not. Such, we think, is the plain intent of the law, and the discharge of the defendant operated to defeat the plaintiff's action.

It follows from this view of the law and facts that the judgment of the District Court must be reversed.[10]

DUNBAR v. DUNBAR

190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. 757

(United States Supreme Court. June 1, 1903)

The defendant in error, being the plaintiff below, brought her action in October, 1899, against the plaintiff in error, in the Municipal Court of Boston, to recover moneys alleged to be due upon a contract, which was set forth in the complaint. Issue was joined and the case tried before a single justice, and judgment ordered for the defendant, with costs. An appeal was taken to the Superior Court of the county of Suffolk, and that court ordered judgment for the plaintiff for one branch only of her claim. The case was reported to the Supreme Judicial Court for the commonwealth, and that court ordered the court below to enter judgment for the plaintiff for both branches of her claim (180 Mass. 170, 62 N. E. 248), and the case was remanded to the Superior Court for the purpose of entering such judgment. Pursuant to the directions of the Supreme Court,

10—Smith v. Wheeler, 66 N. Y. Supp. 780, 55 App. Div. 170; Sweaney v. Baugher, 166 Ind. 557, *acc.* See generally 60 U. of P. Law Rev. 482.

the Superior Court did enter judgment against the defendant for both branches of her claim, for the sum of $851.60 and costs. The defendant then obtained a writ of error from this court, directed to the Superior Court of Massachusetts, where the record remained.

The case shows these facts: The parties were husband and wife, who, in 1889, were living apart, the husband in Ohio and the wife in Massachusetts. In May, 1889, the attorney for her husband came to Massachusetts and saw Mrs. Dunbar, and told her that her husband was about to seek a divorce from her. The wife at this time had no means, and the two sons of the marriage, then respectively nine and twelve years old, were living with her. The purpose of the visit of the attorney was to obtain some assurance from her that she would not contest the case, and, if she did not, that the husband would make provision for aiding in the support of herself and her sons until they arrived of age. The wife denied any intended desertion of her husband, but the result of the negotiations after the wife had taken counsel of friends was to give assurance to the attorney that no defense would be interposed if he made some suitable provision for herself and her children.

Upon the return of the attorney to Ohio, a suit for divorce was commenced by the husband, and the summons served by publication. No appearance was made and there was no opposition to the decree of divorce, which was obtained in July, 1889. It adjudged that the marriage contract theretofore existing between the parties was thereby dissolved, and both parties released from the obligation of the same, and "that the custody of the children of such marriage, one boy, Harry H. Dunbar, aged twelve years, and Willie W. Dunbar, aged nine years, be, and the same are, to remain in charge and under the control of the said Lottie E. Dunbar, the said Horace B. Dunbar to have the privilege of seeing said children at all reasonable times."

The ground of divorce was stated, and the court found "upon the evidence adduced that the defendant has been guilty of wilful absence for more than three years last past from plaintiff, and that, by reason thereof, the plaintiff is entitled to a divorce as prayed for."

After the divorce the husband sent to a friend of his wife, to be delivered to her in performance of his agreement, a written contract, in which he bound himself to pay to Lottie E. Dunbar, of Ashburnham, Mass., $500 yearly, so long as she remained un-

married, in monthly instalments. In that contract he also agreed to pay "to our children, Harry H. Dunbar and Willie W. Dunbar, the sum of $250 each, yearly, until they each attain the age of fourteen years; after that age they are to be paid by me such extra allowance as will give them a good and sufficient education befitting their station in life, and a suitable maintenance until each attains the age of twenty-one years." This writing was signed by the husband and acknowledged before a notary public of Hamilton, Ohio.

Payments upon this contract were made by the husband, but in 1896 they had become somewhat in arrears, and disputes arose as to the validity of the agreement. Thereafter another contract was entered into and payments were made as called for in that contract until some months prior to December 2, 1898. On such last-named date the defendant was adjudged a bankrupt, on his voluntary petition in bankruptcy, in the United States District Court in bankruptcy, southern district of Ohio, western division, and on April 24, 1899, was discharged from all debts and claims provable, under the act of Congress relating to bankruptcy, against his estate, existing on the 2d day of December, 1898.

In the schedule of the defendant it appeared that he named the plaintiff as a creditor, as follows:

Lottie E. Dunbar, Charlestown, Mass.....$ 540
Alimony due up to present time.
Lottie E. Dunbar, Charlestown, Mass..... 1,300
Alimony payable yearly.

The plaintiff, at the first meeting of the creditors in bankruptcy proceedings, which was held before a referee appointed therein, appeared by an attorney, who produced and filed his power of attorney, and filed her claim for $691.63, for instalments on the contract due to December 2, 1898. The husband had paid nothing on the contract since some time before December 2, 1898, and finally the wife commenced an action to recover the amounts due therefrom.

The following is a copy of the contract sued on:

"Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September, 1889, in consideration of said Lottie E. Dunbar's forbearance of suit on such controversies, and in settlement of all such controversies, and in substitution of said agreement of

September, 1889, and in further consideration of the release by Lottie E. Dunbar and in satisfaction of all claims under said original agreement, Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows:

"That said Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of $500, and will pay to her yearly for the support and maintenance of her child, Harry H. Dunbar, the sum of $400 until he shall attain the age of twenty-one years; and shall pay to her yearly for the support and maintenance of her child, Willie W. Dunbar, the sum of $400 until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly instalments between the 1st and 10th of each and every month,—the first instalment being for the month of May, 1896, shall be paid between the 1st and 10th of June, 1896.

"And, in addition to the foregoing, said Horace B. Dunbar agrees to pay the further sum of $100 between the 1st and 10th of July, 1896, over and above the instalment otherwise due for said month.

"And the said Lottie E. Dunbar hereby agrees that she has not, nor shall she have, any other claim or demand against Horace B. Dunbar for contribution to her support and maintenance, or for the support, maintenance, or education of said children, save and except as fixed and limited by this agreement."

Properly signed by both parties and witnessed.

The particulars of her claim were stated as follows:

Horace B. Dunbar to Lottie E. Dunbar, Dr.

1. To instalments due under covenant for alimony from December, 1898, to October 1, 1899, ten months, at $41.66 a month $416.60
2. To monthly allowance due her for support and maintenance of Willie W. Dunbar, from December, 1898, to October 1, 1899, ten months, at $33.33 a month 333.30

$749.90

The defendant pleaded his discharge in bankruptcy as a bar, and the Supreme Judicial Court of the state held that it was not good.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

Had the provisions of this contract, so far as contracting to pay money for the support of his wife is concerned, been embodied in the decree of divorce which the husband obtained from his wife in Ohio on the ground of desertion, the liability of the husband to pay the amount as alimony, notwithstanding his discharge in bankruptcy, cannot be doubted. Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735. We are not by any means clear that the same principle ought not to govern a contract of this nature when, although the judgment of divorce is silent upon the subject, it is plain that the contract was made with reference to the obligations of the husband to aid in the support of his wife, notwithstanding the decree. The facts appearing in this record do not show a case of any moral delinquency on the part of the wife, and the contract, considering the circumstances, might possibly be held to take the place of an order or judgment of the court for the payment of the amount, as in the nature of a decree for alimony. We do not find it necessary, however, to decide that question in this case, because, in any event, we think the contract as to the support of the wife is not of such a nature as to be discharged by a discharge in bankruptcy.

Conceding that the bankruptcy act provides for discharging some classes of contingent demands or claims, this is not, in our opinion, such a demand. Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the bankruptcy act of 1898 (30 Stat. at L. 544, c. 541, U. S. Comp. Stat. 1901, p. 3418), yet this contract, so far as regards the support of the wife, is not dependent upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which, in our opinion, is within the purview of the act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood. A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables. Mr. Justice Bradley, in Riggin v. Magwire, 15 Wall. 549, 21 L. ed. 232, speaking for the court, said that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the bankruptcy act of 1841 [5 Stat. at

L. 445, c. 9]. The 5th section of that act gave the right to prove "uncertain and contingent demands," but it was held that a contract such as above described was not within that section.

It was remarked by the justice in that case that, if the contract had come within the category of annuities and debts payable in future, which are absolute and existing claims, that the value of the wife's probability of survivorship after death of her husband might have been calculated on the principle of life annuities.

But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question: inclination, age, health, property, attractiveness, children. These would, at least, enter into the question as to the probability of continuance of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question.

In many cases where actions are brought for the violation of contracts, such as Pierce v. Tennessee Coal, I. & R. Co., 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335; Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780, and Schell v. Plumb, 55 N. Y. 592, it is necessary to come to some conclusion in regard to the damages which the party has sustained by reason of the breach of the contract, and in such cases resort may be had to the tables of mortality, and to other means of ascertaining as nearly as possible what the present damages are for a failure to perform in the future; but we think the rules in those cases are not applicable to cases like this, under the bankruptcy act.

Taking the liability as presented by the contract, if the mortality tables were referred to for the purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if, having found the value as depending upon the mortality tables, you desire to deduct from that the valuation of the other contingency, it is pure guesswork to do it.

It is true that this has been done in England under the English bankruptcy act of 1869 [32 & 33 Vict. c. 71, § 31]. In Ex parte Blakemore (1877) L. R. 5 Ch. Div. 372, it was held by the Court of Appeal that the value of the contingency of a widow's

marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary. That decision was made under the 31st section of the bankruptcy act of 1869. James, Lord Justice, said:

"No doubt it is uncertain whether the appellant will marry again, just as the duration of any particular life is uncertain. But, though the duration of any particular life is uncertain, the expectation of life at a given age is reduced to a certainty when we have regard to a million of lives. The value of the expectation of life is arrived at by an average deduced from practical experience."

Although the English statute makes it necessary to arrive at a conclusion upon this point, yet there is no "practical experience" as to the chances of the continuance of widowhood, such as may be referred to where the probable continuance of life is involved. In the latter case we have the experience tables in regard to millions of lives, and, under such circumstances, there is, as Lord Justice James said, almost a certainty as to the valuation to be put on such a contingency. But under the English statute, the 31st section makes every kind of debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, so long as the value of the liability is "capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." So, under that act, in Ex parte Neal, L. R. 14 Ch. Div. 579, there was a separation deed between husband and wife, and the husband was to pay an annuity to the wife, which was terminable "in case the wife should not lead a chaste life; in case the husband and wife should resume cohabitation; and in case the marriage should be dissolved in respect of anything done, committed, or suffered by" the other party, after the date of the deed. The annuity was also to be proportionately diminished in the event of the wife's becoming entitled to any income independent of the husband, exceeding a certain amount a year. After the execution of the deed the husband went through bankruptcy, and it was held that the value of the annuity was capable of being fairly estimated and was provable in the liquidation. In that case, speaking of the 31st section of the act of 1869, it was stated that "words more large and general it is impossible to conceive; they cover every species of contingency." It was also stated that it was "difficult to see how any

case could arise which would not come within" the language of this act. Bramwell, Lord Justice, said: "But for the present bankruptcy act, our decision must have been the same as that in Mudge v. Rowan" (1868) L. R. 3 Exch. 85; but he said that the present bankruptcy act was very different in its terms from the act which was in force when that case was decided.

In the case of Mudge v. Rowan, L. R. 3 Exch. 85, there was a deed of separation between husband and wife, in which the husband covenanted to pay an annuity to his wife by quarterly instalments, the annuity to cease in the event of future cohabitation by mutual consent. It was held that this was not an annuity provable under the bankruptcy act of 1849, 12th and 13th Vict. c. 106, § 175; nor a liability to pay money under the 24th and 25th Vict. c. 134, § 154.

The 175th section of the act of 1849 expressly provided that the creditor might prove for the value of any annuity, which value the court was to ascertain. Kelly, Chief Baron, said:

"The annuity seems to me to be so uncertain in its nature as to be impossible to be valued. In many cases the commissioner of bankruptcy may have to deal with contingencies the value of which depends on a variety of considerations, and where the valuation is very difficult. But here I am at a loss to see any single circumstance upon which a calculation of any kind could be based."

Martin, Baron, said:

"This contingency depends on an infinite variety of circumstances, into which it is idle to suppose a commissioner could inquire."

Channell, Baron, concurring, said:

"The tendency of recent legislation, and the course of recent decisions, has been to free a debtor who becomes a bankrupt, from all liability of every kind; but I do not think an order of discharge a bar to such a claim as the present. * * * I quite admit that, to bring an annuity within the act of 1849, it is not necessary to have any actual pecuniary consideration. I also feel that in many cases the difficulty of calculating the present value of contingencies may be very great, and yet they may be within the acts. But here it appears to me that the difficulty is insuperable."

In Parker v. Ince (1859) 4 Hurlst. & N. 52, there was a bond conditioned to pay an annuity during the life of the obligor's wife, provided that if the obligor and his wife should at any

time thereafter cohabit as man and wife the annuity should cease, and it was held that the annual sum thus covenanted to be paid by the defendant was not an annuity within the 175th section of the bankruptcy law or consolidation act of 1849, nor a debt payable upon a contingency within the 177th section, nor a liability to pay money upon a contingency within the 178th section, and consequently the discharge in bankruptcy was no bar to an action for a recovery of a quarterly payment due on the bond. Martin, Baron, said:

"That cannot be such an annuity as would fall within the 175th section, because a value cannot be put upon it. How is it possible to calculate the probability of a man and his wife, who are separated, living together again? Their doing so depends on their character, temper, and disposition, and, it may be, a variety of other circumstances. Then, is it money payable upon a contingency within the 178th section? I think it is not."

It is only, therefore, by reason of the extraordinarily broad language contained in the 31st section of the English bankruptcy act of 1869 that the English courts have endeavored to make a fair estimate of the value of a contract based on the continuance of widowhood, even though the value was not capable of being ascertained by fixed rules, nor assessable by a jury, but was simply to be estimated by the opinion of the court or of some one intrusted with the duty.

In the Blakemore Case, L. R. 5 Ch. Div. 372, after the announcement of the judgment, the report states that it was then arranged that it should be referred to an actuary to ascertain the annuity as a simple life annuity, and to deduct from that value such a sum as he should estimate to be the proper deduction for the contingency of widowhood. In other words, it was left to the actuary to guess the proper amount to be deducted.[11]

No such broad language is found in our bankruptcy act of 1898. § 63*a* provides for debts which may be proved, which, among others, are: (1) "A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such

11—In Victor v. Victor [1912], 1 K. B. 247, it was held that an annuity provided for in a separation agreement was provable despite a provision in the agreement that the annuity should cease upon the parties resuming cohabitation. See 10 Mich. L. Rev. 476.

as were not then payable and did not bear interest." (4) "Founded upon an open account or upon a contract, express or implied."

In § 63*b*, provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph *b*, however, adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of § 63*a*, to be liquidated as the court should direct.

We do not think that by the use of the language in § 63*a* it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.

The language of § 63*a* of the act of 1898 differs from that contained in the bankruptcy act of 1867, and also from that of 1841. The act of 1867, § 19 (14 Stat. at L. 517, 525, c. 176, carried into the Revised Statutes as § 5068), provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt, and permitted applications to be made to the court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the court should order; and the creditor was then to be allowed to prove for the amount so ascertained.

§ 5 of the act of 1841 (5 Stat. at L. 440, c. 9) provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act. But neither the act of 1841 nor that of 1867 would probably cover the case of such a contract as the one under consideration.

Cases have been cited showing some contingent debts which were held capable of being proved under the bankruptcy act of 1898, among which are Moch v. Market Street Nat. Bank, 47 C. C. A. 49, 107 Fed. 897, Circuit Court Appeals, Third Circuit, 1901, and Cobb v. Overman, 54 L. R. A. 369, 48 C. C. A. 223, 109 Fed. 65. Circuit Court of Appeals, Fourth Circuit, 1901. And under former bankrupt acts, the cases of Fisher v. Tifft (1878), 12 R. I. 56; Heywood v. Shreve (1882), 44 N. J. L. 94, and Shelton v. Pease (1847), 10 Mo. 473.

The contingency in the case of Moch v. Market Street Nat. Bank, 47 C. C. A. 49, 107 Fed. 897, was that the bankrupt was the indorser of commercial paper not due at the time of filing the

petition, and it was held that under § 63*a*, subdivision 4, the creditor might prove against the estate of the bankrupt after the liability had become fixed.

In Cobb v. Overman, 54 L. R. A. 369, 48 C. C. A. 223, 109 Fed. 65, the bond of the bankrupt to secure payment to the obligee of an annuity for life was held to be properly proved under § 63*a*, clause 1.

These cases, it will be seen, do not come within the principle of the case at bar. The other cases arising under the acts of 1867 and 1841 do not affect this case.

The Massachusetts court held the debt herein not provable, upon the authority of Morgan v. Wordell, 178 Mass. 350, 55 L. R. A. 33, 59 N. E. 1037, and Goding v. Roscenthal, 180 Mass. 43, 61 N. E. 222. Mr. Justice Barker, in delivering the opinion of the Supreme Judicial Court of Massachusetts in the latter case, said:

"But in Morgan v. Wordell, 178 Mass. 350, 55 L. R. A. 33, 59 N. E. 1037, this court assumed that such claims were not provable under the act, and we follow that view in the present case."

We think the contract, so far as it related to the payment to the wife during her life or widowhood, was not a contingent liability provable under the act of 1898.

* * *

The judgment is affirmed.[12]

In re ROTH & APPEL

181 Fed. 667, 104 C. C. A. 649

(Circuit Court of Appeals, Second Circuit. August 2, 1910)

On August 14, 1907, Adolph Boskowitz, the appellant, entered into an indenture of lease with the firm of Roth & Appel, the present bankrupts, wherein he let to them certain premises in the city of New York for the term of five years from February 1, 1908, at the annual rental of $3,000, payable quarterly in advance. The lease contained the following provision:

"In case the lessee is declared bankrupt, the lease shall terminate and the lessor has a right to re-enter, in which case the

12—The part of the opinion in which the court concluded that the claim based upon the husband's contract to pay money for the support of the children was not provable, is omitted. See Wetmore v. Markoe, *ante*, p. 384.

lessee agrees, as a part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each month, as upon rent days, the difference between the rents and sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry. Such re-entry shall not prejudice the right of the lessor to recover for rent accrued or due at the time of such re-entry."

On January 20, 1908, a petition in involuntary bankruptcy was filed against said Roth & Appel, and on May 27, 1908, they were adjudicated bankrupts. On April 29, 1908, prior to the adjudication, the appellant relet the premises for the remainder of the term to another tenant, who entered into possession on July 1, 1908. The rental under the new lease was at the rate of $175 per month from July 1, 1908, to February 1, 1909, and at the rate of $250 per month thereafter. On July 14, 1908, the appellant filed his claim made up in substance of the following items.

(1) Full rent from February, 1908, to July, 1908.....$1,250
(2) Difference between rent reserved and rent stipulated in new lease from July, 1908, to February, 1909... 525

$1,775

The trustee moved to expunge the claim upon the ground that it was not provable in bankruptcy. The referee expunged from the claim so much as embraced the difference in rents arising subsequent to the time of filing the claim, and allowed the balance. The trustee and the appellant both filed petitions to review the referee's order and the District Court expunged the entire claim. The opinion of the district judge is printed in 174 Fed. 64.

Adolph Boskowitz appeals from the order expunging his claim.

NOYES, Circuit Judge (after stating the facts as above). Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruc-

tion or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in præsenti solvendum in futuro.* On the contrary, the obligation upon the rent covenant is altogether contingent. Watson v. Merrill, 136 Fed. 362, 69 C. C. A. 185, 69 L. R. A. 719. See, also, Coke on Littleton, 292*b;* Wood v. Partridge, 11 Mass. 492; Bordman v. Osborn, 23 Pick. (Mass.) 299.

It follows from these principles that rent accruing after the filing of a petition in bankruptcy against the lessee is not provable against his bankrupt estate as "a fixed liability * * * absolutely owing at the time of the filing of the petition," within the meaning of § 63*a* (1) of the bankruptcy act of 1898. It is not a fixed liability, but is contingent in its nature. It is not absolutely owing at the time of the bankruptcy, but is a mere possible future demand. Both its existence and amount are contingent upon uncertain events. Watson v. Merrill, *supra;* Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118. Also In re Rubel (D. C.) 166 Fed. 131; In re Mahler (D. C.) 105 Fed. 428; In re Hayes, etc., Co. (D. C.) 117 Fed. 879; In re Arnstein (D. C.) 101 Fed. 706; In re Jefferson (D. C.) 93 Fed. 948; In re Inman & Co. (D. C.) 171 Fed. 185.

Even under the bankruptcy acts of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) and 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), which, unlike the present act, expressly permitted the proof of contingent demands, claims for unaccrued rent were not provable. Ex parte Houghton, 1 Low. 554, Fed. Cas. No. 6,725, In re May, 9 N. B. R. 419, Fed. Cas. No. 9,325, and Bailey v. Loeb, 11 N. B. R. 271, Fed. Cas. No. 739, were cases under the act of 1867. Bosler v. Kuhn, 8 Watts & S. (Pa.) 183, was under the act of 1841.

The authorities are not entirely in accord upon the question whether a lease, containing the usual provisions, is terminated by bankruptcy. In some cases it has been held that bankruptcy destroys the relation of landlord and tenant and practically annuls the lease. In re Jefferson, *supra;* In re Hayes, etc., Co., *supra.* See, also, Bray v. Cobb (D. C.) 100 Fed. 270, re-

versed in Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369. In other cases it is held that bankruptcy does not sever such relation, that the tenant remains liable, and that the obligation to pay rent is not discharged as to the future, unless the trustee elect to retain the lease as an asset. Watson v. Merrill, *supra;* In re Hinckel Brewing Co. (D. C.) 123 Fed. 942. See, also, In re Ells (D. C.) 98 Fed. 968.

In our opinion the latter view is the correct one. We think the early law, as stated in Ex parte Houghton, *supra,* is the law under the present bankruptcy statute, applicable in the case of leases having the usual covenants and conditions. In that case the court said:

"The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession; and, if they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent. If they do take it, he is released, as in all other cases of valid assignment, from all liability, excepting on his covenants; and from these he is not discharged in any event."

This reasoning leads by another course to the same conclusion already reached. If the lessee remain liable upon the lease after his bankruptcy in cases where it is not assumed by the trustee, it necessarily follows that his estate is not liable thereon. With a few exceptions, not applicable here, that which is not dischargeable in bankruptcy is not provable in bankruptcy.

The claim in this case was regarded in the report of the referee as a demand for installments of rent falling due according to the terms of the lease subsequent to the time of filing the petition in bankruptcy, and the question considered in such report was whether demands of that character are provable in bankruptcy. So the claim was assumed to be of that character by the district judge, and was ordered expunged upon that assumption. Regarding, then, the claim as one for unaccrued rent, it is clear, upon the principles already examined, that it was not provable against the bankrupt estate under the first clause of § 63*a* of the bankruptcy act.

But, while there may be a question whether the demand as covering the period prior to the re-entry by the lessor might not be considered a claim for rent as such, it is clear that the demand for the difference between the rent reserved and the rent stipu-

lated in the new lease is not such a demand, but is based upon the indemnity provision in the lease shown in the foregoing statement of facts.

The lease in the present case is not a lease containing the usual covenants and conditions. It contains unusual provisions. As we have seen, it expressly provides that in case the lessee is declared bankrupt the lease shall terminate and the lessor shall have the right to re-enter. Under such a lease as this the trustee could not adopt the lease against the lessor's objection. The lessor had the right to terminate it, and did terminate it, by re-entry. And when he terminated it the obligation of the bankrupts as lessees terminated. The question in this case—at least with respect to a large part of the claim—is not, in its essence, whether rent to accrue in the future is provable against a bankrupt estate, but whether a claim founded upon an agreement to indemnify a landlord for loss of rents following bankruptcy is provable.

Undoubtedly the parties to a lease may agree that bankruptcy shall terminate it, and that, upon such termination, all future installments of rent shall at once become due and payable. In such a case, the installments may be regarded as consolidated by the contract, or, perhaps, as falling due by way of penalty. Not improbably claims based upon such leases are provable in bankruptcy. Thus in the case of In re Pittsburg Drug Co. (D. C.) 164 Fed. 482, where a lease provided that, on default in the payment of any rent, the rent for the entire term should at once become due and payable, it was held that, on the bankruptcy of the lessee while in default, the entire rent was "a fixed liability absolutely owing," and provable against the bankrupt estate. But the convenant of indemnity in the present lease was of a very different nature. It called for the payment of no fixed and certain sum. Its purpose was merely to guarantee against possible loss.

The inquiry, then, is as to the status of the lessor's demand upon this indemnity covenant at the time when the petition in bankruptcy was filed; for it is held that that is the time when the provability of claims against the estate of a bankrupt is fixed. Thus in the case of In re Pettingill (D. C.) 137 Fed. 145, it was said:

"Under that act the provability of a claim depends upon its status at the time the petition is filed. If, at that time, the claim is provable, within the definition of § 63, it may be proved.

If, at that time, it does not fall within that definition, but does so at some later time, it cannot be proved."

See, also, Swarts v. Fourth National Bank, 117 Fed. 5, 54 C. C. A. 387; In re Bingham (D. C.) 94 Fed. 796; Watson v. Merrill, *supra;* In re Adams (D. C.) 130 Fed. 381; In re Swift, 112 Fed. 320, 50 C. C. A. 264.

Now, when the petition was filed, the first step toward declaring the lessee bankrupt was taken. It was not certain that bankruptcy would follow; but, if it did follow, the lessor would have the right to re-enter and terminate the lease. Notwithstanding the provision that the lease should terminate in case the lessees should be declared bankrupt, and the lessor should have the right to re-enter, the lease was undoubtedly terminable by the re-entry, and not by the bankruptcy. In re Ells (D. C.) 98 Fed. 967. But the lessor was not obliged to re-enter, and whether he would do so or not was manifestly dependent upon uncertainties. Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature:

(1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.

(2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant.

The case of In re Ells (D. C.) 98 Fed. 967, already referred to, is in point. In that case the lease contained a provision that the landlord might re-enter and resume possession if the bankrupt should be "declared bankrupt or insolvent according to law," and the lessee covenanted that in case of such termination of the lease he would "indemnify the lessor against all loss of rent or other payments which he may incur by reason of such termination during the remainder of the term," and the landlord reentered upon the bankruptcy of the tenant. It was held that the claim of the landlord for the difference between the present letting value of the premises and the rent reserved for the remainder of the term could not be proved against the bankrupt estate of the lessee. Judge Lowell said (p. 968):

"The contract was one of indemnity for loss of rent and other payments, and would be broken only after, and so far as, rent had been lost and payments had been made. * * * At the

time of the adjudication the claim in this case was contingent, first, upon the determination of the lease by the lessor for breach of the covenant; and, second, upon a subsequent loss of rent by the lessor. If the lessor permitted the lease to continue, or if the rent subsequently obtained by him equalled or exceeded that provided in the lease, the claim would not arise. * * * The provisions of the act of 1898 concerning the proof and allowance of contingent claims differ materially from those contained in the acts of 1841 and 1867. * * * Even under the broad provisions of the act of 1867 above referred to, it was held that a provision in a lease that the lessors might re-enter and relet the premises at the risk of the lessees, who should remain liable for the rent, and be credited with the sums actually realized, did not give rise to a provable contingent claim. Ex parte Lake, 2 Low. 544, Fed. Cas. No. 7,991. The provision above quoted of the lease here in question, though not identical with that in Ex parte Lake, yet resembles it so closely as to be essentially similar. If the contingent claim arising in Ex parte Lake could not be proved under the act of 1867, it is clear that the contingent claim arising in this case cannot be proved under the act of 1898."

See, also, In re Shaffer (D. C.) 124 Fed. 111.

For these reasons, we are satisfied that the claim in question as based upon the indemnity covenant is contingent, and not provable against the bankrupt estate under the first clause of § 63*a* of the bankruptcy act.

But this does not dispose of all of the appellant's contentions. It is urged, in effect, that the claim, whether regarded as a demand for rent or as based upon the indemnity provision, is "a debt founded upon an express contract," and provable under the fourth clause of § 63*a*, irrespective of the question whether it is of such character as to be provable under the first clause.

The principal cases cited in support of this contention are In re Smith (D. C.) 146 Fed. 923, and Moch v. Market St. Nat. Bank, 107 Fed. 897, 47 C. C. A. 49, which hold that the liability of a bankrupt indorser of commercial paper, which does not become absolute until after the filing of the petition, is a debt founded upon contract within § 63*a* (4), and provable against the bankrupt estate after it becomes fixed within the time allowed for proving claims.

It is not necessary for the purposes of the present case that

we should go so far as to dispute the conclusions reached in these decisions. While a contract of indorsement is contingent, the extent of the liability is at all times ascertainable, and it might be that such a contract would be provable without it following that an indemnity contract covering possible loss of rents—both the existence and extent of the liability upon which are uncertain and contingent—would be provable.

The present bankruptcy statute, unlike—as we have seen—the acts of 1841 and 1867, does not provide for the proof of contingent claims. Taking the fourth subdivision of § 63*a* as being independent of the first subdivision, still there is nothing to indicate that it was intended to embrace wholly contingent demands. Indeed, it is only by reading § 63*b*—which permits the liquidation of unliquidated demands—in connection with said fourth clause of 63*a*, that any ground is shown for contending that a claim like the one in question can be proved. But this construction expands the provisions of § 63*a* by those of 63*b*, and it is well settled that such a construction cannot be adopted. § 63*b* adds nothing to the class of debts provided under 63*a*. It merely permits the liquidation of an unliquidated claim provable under the latter provision. In Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. ed. 1084, the Supreme Court of the United States said:

"§ 63*a* provides for debts which may be proved, which, among others, are: (1) 'A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest;' (4) 'founded upon an open account, or upon a contract express or implied.' In § 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph 'b,' however, adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of § 63*a*, to be liquidated as the court should direct. We do not think that by the use of the language in § 63*a* it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove."

In Dunbar v. Dunbar, *supra*, the case of Moch v. Market St. Nat. Bank, *supra*, was distinguished.

But, while it is not necessary, in order to reach a decision in this case, to determine whether 63*a* (4) is subject to the limitation contained in 63*a* (1)—that debts to be provable must be absolutely owing at the time of filing the petition—we think it the better view that it is so limited. If it is not so limited, the limitations in the first subdivision are practically of no effect. All claims upon instruments in writing not provable under the first clause, because not absolutely owing at the time of the petition, might be proved as claims founded upon a "contract express or implied" under the fourth clause, if no limitations are attached to the latter. We cannot regard this interpretation as tenable. We think that the different clauses of 63*a* should not be considered as independent, but should be read together, and that the said limitation in the first clause should be considered as repeated in the fourth clause. This interpretation of the section is supported by authority. Thus In re Swift, 112 Fed. 316, 50 C. C. A. 270, already referred to, the Circuit Court of Appeals for the First Circuit said:

"That part of the present bankruptcy act which describes what debts may be proved does not repeat at all points the words 'owing at the time of the filing of the petition,' but it is impossible to consider it other than as though it did thus repeat them."

And In re Adams (D. C.), 130 Fed. 381, the court said:

"But a creditor cannot prove for an indebtedness arising between the filing of the involuntary petition and adjudication. This appears from the analogy of § 63*a* (1), (2), (3), and (5), as applied to the interpretation of clause (4). In clauses (1) and (4), for example, the limit of time must be the same, inasmuch as clause (4) includes clause (1), and, if clause (4) were less limited in point of time, the limit imposed upon clause (1) would become nugatory."

For these reasons, we think that the claim of the appellant, whether regarded as one for unaccrued rent or for indemnity for loss of rent, was not provable against the bankrupt estate under either § 63*a* (1) or 63*a* (4), and was properly expunged by the District Court.

The order of the District Court is affirmed, with costs.[13]

13—See Colman Co. v. Withoft, 195 Fed. 250.

BRITISH & AMERICAN MORTGAGE CO. v. STUART

210 Fed. 425, 127 C. C. A. 157

(Circuit Court of Appeals, Fifth Circuit. January 6, 1914)

SHELBY, Circuit Judge. The petitioner had a mortgage on the bankrupt's real estate, which contains the following stipulations as to attorney's fees:

"That the parties of the first part hereby agree to pay the attorney's fees, and all other expenses which may be incurred by the said mortgagee, its successors or assigns, in the collection of, or in attempting to collect the several sums, herein secured, by a foreclosure of the mortgage, or otherwise, or for enforcing or attempting to enforce any of the terms or provisions hereof, with or without suit, for the payment of which this conveyance is a lien, including solicitor's fees for a foreclosure by suit in equity, and this mortgage shall stand as security for the same, and it shall be no defense as to such solicitor's fees, or other costs, fees, or expenses for a foreclosure in equity, that a foreclosure might have been made under any power herein, the course of procedure being optional with the holder, and it being the purpose and intent hereof to secure such holder in the collecting of principal and interest—hereby secured—net of everything."

The controversy here is as to a claim for attorney's fees based on the foregoing agreement.

After the adjudication in bankruptcy, George Stuart, the trustee of the bankrupt, filed a petition in the District Court to sell the land described in the mortgage, free of liens, and the mortgagee, petitioner here, was made a party to the proceeding. It filed an answer, and also filed proof of the mortgage debt and proof of the attorney's fees for services rendered in and connected with said proceedings "according to stipulations in the mortgage;" but the services were all rendered after the filing of the petition in bankruptcy. No question is made as to the rendition of the services, nor of the fact that they were fairly worth $250, the amount claimed. The referee allowed the mortgage debt as proved, but disallowed the claim for attorney's fees, and the District Court confirmed the referee's order. The petitioner seeks to revise and reverse the order disallowing the attorney's fees.

For a clear understanding of the question to be considered

later, it is first necessary to ascertain the effect and proper construction of stipulations in notes and mortgages to pay attorney's fees for their enforcement and collection. Such stipulations are generally held to be valid, and they are sustained in Alabama, where the mortgaged land is situated. Munter & Faber v. Linn, 61 Ala. 492. The agreement here is for no fixed sum; but such an agreement, if made for a definite sum, would not be conclusive as to the amount on the parties. It could only be enforced for such an amount as was reasonable. Unless the services, or some of the services, covered by the stipulation, are performed, there can be no collection or enforcement of such contract. It follows that the obligation to reimburse the mortgagee or payee for costs of enforcement or collection is contingent, creating no liability unless the services provided for are performed or partly performed. If the debt is paid promptly at maturity, no services of an attorney being required or rendered, no attorney's fees can be added to the amount of the note or mortgage. The creditor would not be permitted to make a profit by collecting fees he did not have to pay. Until the claim becomes due and the services of the attorney are rendered, no debt exists, on account of such stipulation, to be added to the amount of the note or mortgage. Springstead et al. v. Crawfordsville State Bank, 34 Sup. Ct. 195, 231 U. S. 541, 58 L. ed. — (decided December 22, 1913); Williams v. Flowers, 90 Ala. 136, 137, 7 South. 439, 24 Am. St. Rep. 772; McCabe v. Patton, 174 Fed. 217, 98 C. C. A. 225.

The stipulation which we have copied from the mortgage names no sum which was to be paid as attorney's fees. It fixes no time of payment. The payment is to be made for attorney's fees "incurred by the said mortgagee * * * in the collection of, or in attempting to collect, the several sums," etc. It is obvious that it was not in the contemplation of the parties that an attorney would be employed to collect or attempt to collect the mortgage debt before it was due. When the mortgage became due, without the aid of attorneys and without expense, so far as it appears, the debt was extended for four years—a period not yet expired. So it cannot be that any debt on such account was due and "absolutely owing" at the date of bankruptcy, according to the terms of the contract.

The petition in bankruptcy was filed against Vandiver by his creditors on September 19, 1912, and he was adjudicated a bankrupt on October 10, 1912. Up to that time nothing had occurred

which would authorize the addition of any sum to the amount of the mortgage on account of attorney's fees; the mortgagee had not been required, nor had anything happened to authorize him, to employ and compensate an attorney and add the fees to the amount of the mortgage.

So we have the important if not the controlling facts shown by the record that, at the date of the filing of the petition in bankruptcy, no debt for attorney's fees existed; and, the mortgage not being due, the time had not arrived when such debt could have been created.

The bankruptcy act designates the debts which may be proved against a bankrupt's estate. The claim presented here is one "evidenced * * * by an instrument in writing," and, if provable, it must be under § 63*a*, the relevant part of which is as follows:

"Debts Which May Be Proved.—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest. * * *" Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]) § 63*a*.

The limitation is to claims "absolutely owing at the time of the filing of the petition against him." For accuracy and uniformity of administration, some time had to be fixed. The language used excludes the idea that debts may be proved which did not exist and which the bankrupt did not owe at the time fixed—the date of the filing of the petition. Subdivision 5 of the same section forbids the proving of interest which accrues on judgments "after the filing of the petition." When a discharge is granted, it only discharges provable debts, and "none post-dating the petition in bankruptcy are affected by the discharge." Collier on Bankruptcy (8th ed.) 312; § 17, Bankruptcy Act. The property owned by the bankrupt at the date of bankruptcy vests in the trustee, but property acquired after the adjudication does not pass to the trustee. § 70, Bankruptcy Act; In re Parish (D. C.), 122 Fed. 553. The date of the filing of the petition is all-important in setting the time at which the bankrupt's condition becomes fixed in relation to debts provable against his estate. This is shown pointedly by a class of cases

relating to court costs. Where part of such costs are incurred before the filing of the petition and part afterwards, the part incurred before the filing is provable against the estate and dischargeable, and the part incurred afterwards is not provable or dischargeable. 1 Remington on Bankruptcy, § 692.

In McCabe v. Patton, 174 Fed. 217, 98 C. C. A. 225, the question was on the allowance of attorney's fee provided for in the notes. The court held that, to be allowed, it must meet the requirements of being "a fixed liability as evidenced by * * * an instrument in writing absolutely owing at the time of the filing of the petition against him." The claim was rejected for want of proof of the rendition of collection services before the date of bankruptcy. In re Gebhard (D. C.), 140 Fed. 571, the attorney's fee was rejected because no attorney was, in fact, employed by the creditor "until after the bankruptcy." In re Garlington (D. C.), 115 Fed. 999, the attorney's fees were rejected because the note had not matured at the time of the bankruptcy. And In re Keeton, Stell & Co. (D. C.), 126 Fed. 426, the note had become due, but had not been placed in the hands of an attorney prior to the filing of the petition in bankruptcy, and the fees were disallowed. In re Jenkins (D. C.), 192 Fed. 1000, a provision was placed in chattel mortgages for attorney's fees, and the mortgages were placed in the hands of an attorney, but no services were performed by him; and, subsequently, on the bankruptcy of the mortgagor, his trustee sold the property, and the question arose as to the proof of the attorney's fees as a debt against the bankrupt's estate. The claim was disallowed. See, also, In re Roche, 101 Fed. 956, 42 C. C. A. 115. The rule that the fees, to be provable, must have accrued before the filing of the petition, seems to be generally recognized. Collier on Bankruptcy (8th ed.) 708; 1 Remington on Bankruptcy, §§ 670, 671; 1 Loveland on Bankruptcy, 619, § 300.

In Merchants' Bank v. Thomas, 121 Fed. 306, 57 C. C. A. 374, decided by this court, and cited by the petitioner, in which attorney's fees provided for by notes were allowed to be proved, the notes had been placed in the hands of an attorney and he had performed services before the bankruptcy. The case in that regard was wholly unlike the instant case.

Although not due, the mortgage was a provable debt, with the rebate of interest prescribed by § 63*a*.

But the petitioner was not obliged to prove his mortgage as a debt against the bankrupt's estate. 1 Jones on Mortgages (6th

ed.) § 729. The discharge of the bankrupt would not have affected his right to enforce his mortgage when it became due (In re Blumberg [D. C.] 94 Fed. 476; Bank of Commerce v. Elliott, 6 Am. Bankr. Rep. 409, 109 Wis. 648, 85 N. W. 417; Paxton v. Scott, 10 Am. Bankr. Rep. 80, 66 Neb. 385, 92 N. W. 611; 2 Jones on Mortgages [6th ed.] § 1236); and if, on its becoming due, he was required to resort to suit, it may be that the amount of his attorney's fees would be a proper claim to add to the amount of the mortgage. But that is far from allowing the mortgage debt to be proved, with abatement of interest, before it is due, with the addition of attorney's fees which, under the circumstances, could not have been within the contemplation of the parties when the contract was made and which were not absolutely owing at the date of bankruptcy.

In Riggin v. Magwire, 15 Wall. 549, 21 L. ed. 232, it was held that, although the fifth section of the Bankruptcy Act of 1841 gave the right to prove "uncertain and contingent demands," so long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability and there is no means of removing the uncertainty by calculation, such contract or engagement is not provable under the act. The same construction is placed on the present act. Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. ed. 1084. So it seems clear that the agreement as to attorney's fees, on its face and at the date of bankruptcy, was not provable as a claim against the bankrupt estate.

After the date of the filing of the petition, the bankrupt cannot add to the liabilities of his estate. He may create personal liabilities which are not affected by the bankruptcy proceedings and against which his discharge, when obtained, will not protect him. It may be conceded (but we do not so decide) that, although the mortgage was not due, the proceedings to sell, free of liens, in the District Court were equivalent to foreclosure, and that the mortgagee, being called into the litigation, was necessarily required to employ an attorney, and that such employment would be embraced within the clause of the mortgage relating to attorney's fees, and all this would only show an indebtedness or liability accruing after the filing of the petition in bankruptcy; and, whether considered as a secured or an unsecured claim, it was one not provable nor dischargeable under

the provisions of the bankruptcy act. In re Burka (D. C.), 104 Fed. 326.

The petition to revise is denied, and the decree is affirmed.[14]

In re NEFF

157 Fed. 57, 84 C. C. A. 561

(Circuit Court of Appeals, Sixth Circuit. November 20, 1907)

LURTON, Circuit Judge. These three appeals have been heard together, as they involve the provability of a number of claims against the bankrupt of like character. In tenor and substance the contracts are alike. That presented by Emily M. Nichols is an example and is as follows:

"$2,500.00 Bellaire, Ohio, Feb. 7, 1905.

"Two years after date, I, we, or either of us promise to pay to the order of Miss Emily M. Nichols twenty-five hundred and no 100 dollars at the office of the Avery-Caldwell Mfg. Co., upon surrender of certificate No. 38 for 2,500 shares of preferred stock of said company, value received interest 7 per cent per annum.

"J. Brent Harding,
"Theodore Neff."

Some of these contracts related to the stock of a manufacturing corporation, known as the Avery-Caldwell Company, and others to the stock of the Federal Casket Company. It was agreed, as a fact, that the contract set out and others of like character were made by the persons signing the same as promoters, and to induce sales of the stock of the corporations named, and that in consideration of this agreement the claimants became subscribers to the stock of said companies, paying therefor the amount named in each contract, and received therefor the shares of stock mentioned. It was also agreed that both of these corporations were "insolvent" before the bankruptcy of said Neff, and that this stock was of no value. The stock certificates were filed as part of the proof in each case and tendered to the trustee. The contracts are plainly agreements to purchase the shares of stock named at the time and price stated. They rest upon a sufficient consideration, and are written agree-

14—See in re Pettingill, 137 Fed. 143; Sayre v. Glenn, 87 Ala. 631; In re Putnam, 193 Fed. 464; In re Ellis, 143 Fed. 103.

ments to take and pay for the shares named and signed by the parties to be charged and delivered to and accepted by the promisees. There is, therefore, nothing in the objection as to the contracts being invalid under the statute of frauds because not signed by claimants also. Thayer v. Luce, 22 Ohio St. 62; Himrod Furnace Co. v. Cleveland, 22 Ohio St. 451; Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; Brown's Statute of Frauds, § 345c. The status of a claim must depend upon its provability at the time the bankrupt petition was filed. At that time it must come within the definition of § 63 of the bankrupt act; it cannot be benefited by its status at a later date. The defense is that these claims were not "fixed liabilities," "absolutely owing" at the time of the filing of the petition against the bankrupt. This is based upon the fact that the liability of the bankrupt is made dependent upon the surrender of the stock certificate at a date which had not then arrived, and that it was optional with the promisees to surrender or keep the stock until that time, and that the liability of the promisor was undetermined and contingent until such surrender at the time named.

That the promisor might refuse performance until the time named is true. But if, before the time of performance, one absolutely repudiate liability and disavow unequivocally any purpose to perform at any time, the other party may treat such repudiation, at his election, as a breach of the agreement and sue for his damages. This is the rule as settled in Hochster v. De La Tour, 2 El. & Bl. 678, and approved by the Supreme Court in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953, and by this court in Foss Brewing Co. v. Bullock, 16 U. S. App. 311, 59 Fed. 83, 8 C. C. A. 14, and Edward Hines Lumber Co. v. Alley, 43 U. S. App. 169, 73 Fed. 603, 19 C. C. A. 599; McBath v. Jones Cotton Co., 149 Fed. 383, 79 C. C. A. 203; Michigan Yacht Co. v. Busch, 143 Fed. 939, 75 C. C. A. 109. So, if one of the parties absolutely disables himself from performing the contract by putting performance out of his power, the other party may treat that as a repudiation and bring his action to recover damages then or wait the time of performance at his election. This aspect of the question of an anticipatory breach is well put by Fuller, chief justice, in Roehm v. Horst, cited above, when he says:

"It is not disputed that if one party to a contract has de-

stroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time of performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly."

In Lovell v. St. Louis Life Ins. Co., 111 U. S. 264, 274, 4 Sup. Ct. 390, 395, 28 L. ed. 423, the company had failed and transferred its business to another company. The court held that this authorized one insured to treat the contract as at an end and to sue to recover back premiums paid although the time of performance had not arrived. Mr. Justice Bradley, for the court, said:

"Our third conclusion is that, as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in nature, the complainant had a right to consider it as terminated by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of United States v. Behan, 110 U. S. 339, 4 Sup. Ct. 81, 28 L. ed. 168, to which we refer."

See, also, Carr v. Hamilton, 129 U. S. 669, 9 Sup. Ct. 295, 32 L. ed. 669.

Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance. In the case styled In re Swift, 112 Fed. 315, 50 C. C. A. 264, this consequence was considered by the Court of Appeals for the First Circuit in a very satisfactory opinion by Putnam, C. J. There the obligation of a broker to deliver certain shares of stock on demand was held to be breached by bankruptcy, and that no prior demand was essential, a right of action accruing simultaneously with the bankrupt petition, which was the act of disablement to which the

adjudication related. In re Pettingill Co. (D. C.), 137 Fed. 143, 147, Judge Lowell, in a very able and discriminating opinion in which the authorities are considered in the light of the requirements for a provable debt under the present bankrupt law, reached the conclusion that:

"If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under § 63*b*, Act July 1, 1898, c. 541 (30 Stat. 562, U. S. Comp. St. 1901, p. 3447)."

In that case it was held that a contract guaranteeing "the redemption" of corporate shares, three years after date of issue, was a provable claim, although the time for "redemption" had not arrived at date of bankruptcy.

It is sufficient that a claim becomes provable as a consequence of bankruptcy. The right to sue for and recover damages then accrues. As Judge Lowell puts it In re Pettingill Co., cited above:

"In admission to proof, however, the claim need not arise before bankruptcy, nor need the contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident."

The creditor by offering to file his claim manifests his election to treat the contract as broken. This the court held he might do. The decree in each case is affirmed.[15]

In re INMAN & CO.

171 Fed. 185

(District Court, N. D. Georgia. June 7, 1909)

NEWMAN, District Judge. * * *

It will be perceived from the foregoing that T. B. Ketterson was in the employment of the bankrupt firm at the time the pro-

15—See Pennsylvania Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721, 743; In re Scott Transfer Co., 216 Fed. 308, commented upon in 27 Harv. L. Rev. 469.

ceedings in bankruptcy were filed, and that the term for which he was employed had not expired when the bankruptcy occurred. He seeks to prove a claim for the unexpired portion of the time of his employment. He was allowed without objection the amount that was due him at the time the bankruptcy proceedings were instituted, and, as it was less than three months, he was allowed priority for the same.

The question presented is an interesting one, and is almost without direct authority since the passage of the present bankruptcy act. The right to prove, if it exists at all, is under paragraph 4, § 63, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]). § 63 provides that:

"Debts of the bankrupt may be proven and allowed against his estate which are * * * (4th) founded upon an open account or upon a contract expressed or implied."

§ 63*b* provides that:

"Unliquidated claims against the bankrupt, may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

It is conceded that if a breach of contract had occurred prior to the commencement of the bankruptcy proceedings, and the claim for damages on account of the breach already existed, that the amount of such damages might be liquidated in such manner as the court might direct; but the immediate question is whether where there is a discontinuance of employment growing out of, and resulting from, the filing of a petition in bankruptcy, and that only the right to damage exists and may be proved and the amount of such damage ascertained. Stating the inquiry somewhat differently, it is this: Whether, where proceedings in involuntary bankruptcy are instituted, followed by an adjudication, and the bankrupt is a party to a contract of employment not terminated, this of itself is a breach of the contract on the part of the bankrupt, or is the contract simply terminated and annulled by operation of law without any default on the part of the bankrupt? The latter being true, there is no cause of action arising as for a breach of contract.

* * *

[After citing the corresponding section of the act of 1867, and referring and quoting from the case of Dunbar v. Dunbar, 190 U. S. 340, *supra*, the court continued:]

According to this, § 63*b* adds nothing to 63*a* as to the class of debts which may be proven, and it was not intended by § 63*a* to admit proofs of contingent debts or contingent liabilities. The liability here on the part of the employers was certainly contingent. It was contingent upon the life, health, and ability to render services on the part of the employé in the future, and contingent also upon the life of the members of the firm of Inman & Co. The death of one member would have dissolved the firm and necessitated the winding up of its affairs.

A number of decisions have been cited from other District Courts and some from Circuit Courts of Appeals in other circuits. The only one I have seen in the Circuit Courts of Appeals for this circuit is Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118. This was an effort to prove a claim for future rental and the judgment of the District Court refusing to allow the claim was affirmed. This decision is in line with the decisions on the subject of rent contracts, and it is conceded by counsel for the claimants here that contracts for future rent are not provable under the present bankruptcy act. The latest decision I have seen on this question of the right to recover rent not due is In re Rubel et al. (D. C.) 166 Fed. 131. The case was decided by Judge Quarles of the District Court for the Eastern Division of Wisconsin. In that opinion it is said:

"The text-books and the authorities all seem to concur in the proposition that rent upon such a lease which has not accrued at the time of adjudication cannot be proven as a claim in bankruptcy. Loveland on Bankruptcy (3d ed.) 265, 268; Collier on Bankruptcy, 479; In re Jefferson (D. C.) 93 Fed. 948; Bray v. Cobb (D. C.) 100 Fed. 270; Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; In re Hays and Foster (D. C.) 117 Fed. 879; Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719. These authorities are not in accord as to the method of reasoning by which the conclusion is reached. Some of them hold that the adjudication destroys the relation of landlord and tenant, and practically annuls the lease. Others hold that the claim, not being provable in bankruptcy, is not affected by the discharge; that the bankrupt remains bound by his covenant; but that the trustee is not bound thereby. It is conceded on all hands that the trustee has a reasonable time after his appointment to determine whether he will adopt the lease as an asset of the estate, and offer the same for sale, or

whether he will ignore it entirely. For practical purposes it makes no difference in the instant case which line of authority is adopted, for either is fatal to a recovery of rent, as such, for the unexpired term."

After some other discussion immaterial here the judge concludes:

"It may be remarked in passing that, if application had been made to liquidate the claim pursuant to § 63*b*, the proceeding would have been ineffective unless the claim were of such a nature that, being liquidated, it might have been proven under § 63*a*. Dunbar v. Dunbar, 190 U. S. 340, 350, 23 Sup. Ct. 757, 47 L. ed. 1084. We have seen that the unearned installment of rent, although liquidated by a written lease, cannot be proven under § 63*a*, so that the proceeding to liquidate would have been unavailable in the instant case."

Counsel for the claimants here rely mainly upon the following cases: In re Swift, 112 Fed. 315, 50 C. C. A. 264, In re Stern, 116 Fed. 604, 54 C. C. A. 60, and In re Pettingill & Co. (D. C.) 137 Fed. 143, and upon the cases therein cited, particular stress being laid upon the case cited by Judge Lowell, Ex parte Pollard, Fed. Case No. 11,252 (2 Lowell, 411, and 17 N. B. R. 228). The second headnote in the latter case is to this effect:

"The filing of a petition in bankruptcy by a corporation *ipso facto* dissolves the contract with an employé, and is tantamount to a dissolution, and he may have his damages assessed and prove his amount in a bankruptcy court."

It may be remarked that this decision, Ex parte Pollard, was under the act of 1867, which, as has been stated, in reference to the proof of claims of this character was entirely different from the present act. None of the other cases relied upon were cases of employer and employé. In re Pettingill & Co. (D. C.) 137 Fed. 143, Judge Lowell in the opinion says:

"It seems, therefore, that the test of provability under the act of 1898 may be stated thus: If the bankrupt at the time of bankruptcy by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is equivalent of disenablement and repudiation. For the assess-

ment of damages proceedings may be directed by the court under § 63*b* (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]).''

Counsel for the claimants here also consider In re Silverman (D. C.) 101 Fed. 219, as favorable to them. In that case Silverman Bros. on the 9th day of January, 1899, made a deed of trust of their stock of goods in favor of their creditors. One Swift was named as trustee in the deed of trust, and took possession of the stock of goods, and on the same day, January 9, 1899, discharged from the store the employés under Silverman Bros., including one Rosenberg. On the 18th day of January thereafter proceedings in involuntary bankruptcy were instituted against Silverman Bros., and Swift was appointed receiver. Rosenberg's claim was based upon the breach of his contract of employment, and he claimed $1,200 for the remainder of the contract year. In the opinion in this case Judge Philips says:

''There can be no question but what if on the 9th day of January, 1899, there was a breach of the contract between Silverman Bros. and Rosenberg by his discharge from their service, or by their voluntary act which rendered the performance of the contract on their part impossible, a cause of action at once arose in favor of Rosenberg against Silverman Bros. for damages; and it is equally clear that the subsequent adjudication of bankruptcy in February, 1899, did not put an end to the cause of action, as it was then an existing right, which the mere adjudication in bankruptcy could not destroy. So the real question in this case is not whether an adjudication in bankruptcy against the employer would put an end to a contract with an employé like the one in question, so that the discharge of the employé would be under the operation of the bankruptcy law, and not by reason of the voluntary act of the employer, but it is whether or not the act of Silverman Bros. in making the deed of trust and placing Swift in absolute charge of the store and its business, whereby Rosenberg was displaced as manager and employé, did not constitute a breach of the contract, and create a subsisting cause of action, three weeks before the adjudication in bankruptcy.''

The court then holds that there was such a breach of contract, and fixes the amount that Rosenberg would be entitled to recover. I do not consider this case of In re Silverman authority either way.

In the case of In re Imperial Brewing Company (D. C.) 143

Fed. 579, decided by Judge Philips for the Western District of Missouri, it is said:

"The question to be decided is: Did the adjudication in bankruptcy against the Imperial Brewing Company in and of itself constitute such a breach of the contract as to mature the whole executory contract, entitling the claimant to prove up and have allowed against the estate in bankruptcy the damages claimed? While the statement of the petition is a little indefinite respecting the proceedings leading to the adjudication, the court will take cognizance of its own records, which show that it was an involuntary proceeding in bankruptcy—necessarily so because the corporation could not on its own voluntary petition be adjudged a bankrupt. While the petition herein states that the Imperial Brewing Company was permanently disabled from performing said contract and repudiated the same in all its parts, and that it retired permanently from business and was hopelessly insolvent, etc., these results are alleged to follow 'by reason of said bankruptcy proceedings.' At the time of the adjudication in bankruptcy, there was no debt owing by the bankrupt to the claimant. There had been no delivery or tender of delivery prior thereto, and none since. It may be conceded as the law of this jurisdiction that where a party is bound from time to time, as expressed in the contract, to deliver articles to be manufactured or products to be grown, each parcel as delivered to be paid for at a certain time and in a certain way, a refusal by the vendee to be further bound by the terms of the contract or to accept further deliveries constitutes a breach of the contract as a whole, and gives the vendor a right of action to recover the damages he may sustain by reason of such refusal. In such case the positive refusal of the vendee to perform when tender is made, or notice by him to the vendor before maturity of the time for delivery that he will not carry out the contract, will release the vendor from making any tender, and entitle him to an action in advance of the fixed period for delivery on his part to recover damages as for breach of the whole contract. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953. The sole reliance of the claimant to bring it within this rule for such breach is predicated on the adjudication in an involuntary proceeding in bankruptcy against the vendee. I am unable to consent to the proposition that such an adjudication in bankruptcy, *ex vi termini*, is in law tantamount to a refusal of the bankrupt to perform, or that it thereby permanently disabled itself from

performance to bring the claim asserted by petitioner within the operation of the rule laid down in Roehm v. Horst, *supra.*"

The judge then cites and quotes from the opinion in Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, decided by the Circuit Court of Appeals for the Eighth Circuit, and In re Swift, *supra,* and says:

"In re Swift, 112 Fed. 315, 50 C. C. A. 264, a broker had made a contract to deliver certain stock to a customer. It was held that he made it impossible to fulfill his agreement to deliver the stock by his adjudication in bankruptcy, for the reason that it took the stock from him and vested it with all his property, in his trustee. But that is clearly not this case."

Judge Philips refers to In re Pettingill & Co., *supra,* in this way:

"I may say that I can concur in the syllabus of that case that, under the bankruptcy act, the provability of a claim depends upon its status at the time of the filing of the petition in bankruptcy. If not then a provable debt, as defined in the act, it cannot be proved, although it may thereafter come within such definition. * * * If, however, it was intended to hold that as applied to an executory contract for the sale of annual crops to be raised in successive years, where no breach had occurred at the time of an involuntary adjudication in bankruptcy, the mere act of such declared statutory insolvency constituted such a breach of the contract as to enable the vendor to prove up against the estate the contingent damages, as, on a repudiation of the contract by the vendee, I cannot consent thereto. There was no renunciation by the vendee company of the contract after the commencement of performance or renunciation before the time for performance had arrived. Nor has the vendee deliberately incapacitated itself or rendered performance of the contract impossible within the rule laid down in Roehm v. Horst, 178 U. S. 18, 20 Sup. Ct. 787, 44 L. ed. 953. As a discharge in bankruptcy under § 1, cl. 12, means no more than 'the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by the act,' and the claim for damages for a possible future breach of a contract is not a debt provable against the estate, in the absence of any refusal on the part of the bankrupt to recognize the contract, and he has not voluntarily or positively disabled himself from performing it, where its performance does not become obligatory until after the adjudication in bankruptcy,

my conclusion is that the claim in question is not one provable in bankruptcy. It is a noteworthy fact that, under the bankrupt acts of 1841 and 1867, the right was given to prove 'uncertain and contingent demands' against the estate. This provision was omitted from the present bankruptcy act of 1898. In my judgment this omission is significant."

The important question in the instant case, and the one which in my judgment is controlling, is discussed in the cases to which I shall now refer. The first of these is In re Jefferson (D. C.) 93 Fed. 948, decided by Judge Evans for the District of Kentucky. The syllabus in that case is as follows:

"A lease for a term of years, reserving rent payable in monthly installments, is terminated by the adjudication of the lessee as a bankrupt during the term; and the landlord has no provable claim against the tenant's estate in bankruptcy for the rent which would have accrued under the lease after the date of such adjudication."

The reasoning of the court in the opinion to the effect that proceedings in bankruptcy terminate the relation of landlord and tenant applies, it seems to me, with equal force to the relation of employer and employee. The next case in order is that of Bray v. Cobb (D. C.) 100 Fed. 270, decided by Judge Purnell for the Eastern District of North Carolina. In the opinion he says:

"The relation of landlord and tenant is severed by operation of the bankruptcy law."

The question was again presented before Judge Evans In re Hays, Foster & Ward Company (D. C.) 117 Fed. 879, and the opinion expressed In re Jefferson, *supra,* was reiterated. In both cases the conclusion reached is based largely upon the decisions in Bailey v. Loeb, 2 Fed. Cas. 376; In re Webb, 29 Fed. Cas. 494; In re Breck, 4 Fed. Cas. 43. In Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, decided in the Circuit Court of Appeals for the Eighth Circuit, the opinion being delivered by Circuit Judge Sanborn, the court differs from the views expressed in the three cases just referred to, although it reaches the same result; that is, that a claim for damages for a breach of a contract in a lease to pay installments of rent for the use of the premises at times subsequent to the filing of the petition in bankruptcy is not provable under the bankruptcy law of 1898. In the opinion it is said:

"An adjudication in bankruptcy does not dissolve or termi-

nate the contractual relations of the bankrupt, notwithstanding the decisions to the contrary In re Jefferson (D. C.) 93 Fed. 448; Bray v. Cobb (D. C.) 100 Fed. 270; and Re Hays, Foster & Ward Company (D. C.) 117 Fed. 879. Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements and subject to the liabilities he has incurred. It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy, and, since the filing of the petition in bankruptcy may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years, he agrees to purchase or to convey property, and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become liable for his debts, but he does acquire the right to accept and assume or to renounce the executory agreements of the bankrupt as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them. And so, throughout the entire field of con-

tractual obligations, the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability. In re Curtis, 9 Am. Bankr. Rep. 286, 109 La. 171, 33 South. 125; In re Ells (D. C.) 98 Fed. 967, 968; Witthaus v. Zimmerman, 11 Am. Bankr. Rep. 314, 315, 91 App. Div. 202, 86 N. Y. Supp. 315; White v. Griffing, 44 Conn. 437, 446, 447; In re Pennewell, 119 Fed. 139, 55 C. C. A. 571."

It will be seen from the foregoing that the conclusion reached in this case of Watson v. Merrill was that claims for future rent, and probably, from the language used in the opinion, for future personal services, are not provable in bankruptcy, though the reason given therefor is entirely different from that given in the other cases. According to this last opinion contracts such as those in question here will remain of force and unaffected by the bankruptcy proceedings. Bailey v. Loeb, 2 Fed. Cas. 376, was decided under the act of 1867 by Circuit Judge Wood, afterwards a Justice of the Supreme Court. An extract from the opinion in that case will show the view that Judge Wood entertained of the matter, as follows:

"For instance, a business man has a manager or bookkeeper hired by the year, at a salary payable quarterly. At the end of two months he is adjudicated bankrupt. His manager or bookkeeper may prove for a proportionate part of his salary up to the time of the bankruptcy, but he cannot prove for any part that may accrue and fall due after the bankruptcy. The clear purpose of the bankruptcy act is to cut off all claims for rent to accrue, or for services to be rendered, after the date of the bankruptcy."

The fact that this decision by Judge Wood was under the bankruptcy act of 1867 strengthens it as an authority, because it is generally conceded that the bankruptcy act of 1867 was more liberal as to the proof of claims for contingent liabilities than is the present act. In Malcomson v. Wappoo Mills et al. (C. C.) 88 Fed. 680, Judge Simonton held that:

"Damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise, where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all others from interfering with its business or property. In such cases the breach of contract is *damnum absque injuria*."

It seems clear to me that adjudication in bankruptcy ends contracts for rent, and for personal services, and I agree with

the views expressed in the opinions in In re Jefferson, *supra,* Bray v. Cobb, *supra,* In re Hayes, Foster & Ward Company, *supra,* and Malcomson v. Wappoo Mills et al., *supra.* The case of James Dunlap Carpet Company (D. C.) 163 Fed. 541, is a case favorable to the contention of the claimants here to the extent of allowing proof of claim. The difficulty about the case to my mind is that the learned judge based his decision on Moch v. Market Street National Bank, 107 Fed. 897, 47 C. C. A. 49. In the case of Moch v. National Bank the person seeking to prove had indorsed for the bankrupt and the paper matured after the bankruptcy proceedings were instituted. The indorser paid the paper, and then proposed to prove it as a debt against the bankrupt in the bankruptcy proceedings. I can see no similarity at all between such a case and the case of an employé seeking to prove for salary to be earned by services to be rendered in the future. The indorsement in the Moch Case was a definite and fixed liability which the indorser had undertaken for the bankrupt, and it was in existence before the bankruptcy proceedings commenced. It matured, and the indorser was compelled to pay the debt pending the bankruptcy proceedings. This is entirely different from a contract to render personal services. Such services depend upon the life, health, and ability otherwise of the employé to render the services, and also upon the life, certainty, and perhaps other contingencies as to the employer. But it is a partnership in bankruptcy here, and whatever is true as to individual cases there would seem to be no doubt, first, that a partnership is dissolved by the bankruptcy proceedings (22 Am. & English Cyclopedia of Law [2d ed.] 202, and 30 Cyc. 654, and cases cited in both); and, second, if the firm is dissolved by operation of law, then certainly the contracts of that firm are ended.

In Griggs v. Swift, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 14 Am. St. Rep. 176, it is held in the opinion by Chief Justice Bleckley:

"From the very nature of a contract for the rendering of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent on the one hand upon the life of the employé, and, on the other, upon the life of the partnership, provided the death in either case was not voluntary."

Wood on Master and Servant, § 163, is then quoted with approval to the following effect:

" 'Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that a servant is absolved therefrom; but, if the dissolution results from the act of the parties, they are liable to the servant for his loss therefrom, but, if the dissolution results from the death of a member of the firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. * * * So, if a firm consists of two or more persons, and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm, and this is so even though other persons are taken into the firm. The test is whether the firm is dissolved. So long as it exists, the contract is in force, but, when it is dissolved, the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties.' "

None of the cases cited from the United States Courts seem to bear directly upon the question immediately involved here—that is, of the right of an employé to prove for future services—except, perhaps, the case of James Dunlap Carpet Company, *supra*, and with the utmost respect for the learned judge deciding the case I am, for the reason stated above, unable to agree with his conclusion. I have, perhaps, cited authorities at unnecessary length, but the question is an interesting one, and is presented in its present shape for the first time in this district. I do not believe that it was the intention and purpose of the bankruptcy act that contracts extending into the future for rent and personal services should be left hanging over the bankrupt to embarrass and harass him after his discharge in bankruptcy. It is said that if this is not true, and he is relieved of such liability by the bankruptcy act, it follows that claims for such rent and personal service should be admitted to proof in the bankruptcy proceedings. I do not think this follows at all. The adjudication in bankruptcy ends all such contracts. Of course, proof may be allowed for any amount due prior to the institution of the proceedings in bankruptcy. It is provided by the bankruptcy act that for most personal services the employé would have priority for any amount due him for as much as three months preceding the bankruptcy proceedings. This

fact of priority of payment for three months extending to so large a class of employés is another reason why I believe it was the intention, in passing this act, that such contracts should terminate with the adjudication in bankruptcy. All this is certainly true as to a partnership. The adjudication dissolves it by operation of law, and that dissolution ends all its liabilities except such as are expressed in the act.

My conclusion is that the referee in bankruptcy correctly decided that this claim should not be admitted to proof.[16]

D. Secured Claims

SEXTON v. DREYFUS et al.

219 U. S. 339, 55 L. ed. 244, 31 Sup. Ct. 256

(United States Supreme Court, January 23, 1911)

Mr. Justice HOLMES delivered the opinion of the court:

In both of these cases, secured creditors, selling their security some time after the filing of the petition in bankruptcy, and finding the proceeds not enough to pay the whole amount of their claims, were allowed by the referee to apply the proceeds first to interest accrued since the filing of the petition, then to principal, and to prove for the balance. The referee certified the question whether the creditors had a right to the interest. The district judge answered the question in the affirmative, giving the matter a very thorough and persuasive discussion, and declining to follow the English rule. Re Kessler, 171 Fed. 751. On appeal, his decision was affirmed by a majority of the Circuit Court of Appeals. 180 Fed. 979.

The argument certainly is strong. A secured creditor could apply his security to interest first when the parties were solvent (Story v. Livingston, 13 Pet. 359, 371, 10 L. ed. 200, 206), and liens are not affected by the statute. § 67*d* [30 Stat. at L. 564, c. 541, U. S. Comp. Stat. 1901, p. 3449]. The law is not intended to take away any part of the security that a creditor may have, as it would seem at first sight to do if the course adopted below were not followed. Some further countenance to that course is thought to be found in § 57*h*, which provides that

16—See In re James Dunlap Carpet Co., 163 Fed. 541; In re D. Levy & Sons Co., 208 Fed. 479.

the value of securities shall be determined by converting them into money "according to the terms of the agreement," for it is urged that, by construction, the right to apply them to interest is as much part of the agreement as if it had been written in. Nevertheless, it seems to us that, on the whole, the considerations on the other side are stronger and must prevail.

For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. Ex parte Bennet, 2 Atk. 527. This rule was applied to mortgages as well as to unsecured debts (Ex parte Wardell, 1787; Ex parte Hercy, 1792, 1 Cooke, Bankrupt Laws, 4th ed. 181 [1st ed. Appx.]); and notwithstanding occasional doubts, it has been so applied with the prevailing assent of the English judges ever since (Ex parte Badger, 4 Ves. Jr. 165; Ex parte Ramsbottom, 2 Mont. & A. 79; Ex parte Penfold, 4 De G. & S. 282; Ex parte Lubbock, 9 Jur. N. S. 854; Re Savin, L. R. 7 Ch. 760, 764; Ex parte Bath, L. R. 22 Ch. Div. 450, 454; Quartermaine's Case [1892] 1 Ch. 639; Re Bonacino, 1 Manson, 59). As appears from Cooke, *supra*, the rule was laid down not because of the words of the statute, but as a fundamental principle. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state. No one doubts that interest on unsecured debts stops. See § 63 (1). Shawnee County v. Hurley, 94 C. C. A. 362, 169 Fed. 92, 94.

The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. If, as in a well-known illustration of Chief Justice Shaw's (Parks v. Boston, 15 Pick. 198, 208), the whole matter could be settled in a day by a pie-powder court, the secured creditor would be called upon to sell or have his security valued on the spot, would receive a dividend upon that footing, would suffer no injustice, and could not complain. If, under § 57 of the present act, the value of the security should be determined by agreement or arbitration, the time for fixing it naturally would be the date of the petition. At that moment the creditors acquire a right *in rem* against the assets. Chemical Nat. Bank v. Armstrong, 28 L. R. A. 231, 8 C. C. A. 155, 16 U. S. App. 465, 59 Fed. 372, 378, 379; Merrill v. National

Bank, 173 U. S. 131, 140, 43 L. ed. 640, 643, 19 Sup. Ct. Rep. 360. When there is delay in selling because of the hope of getting a higher price, it is more for the advantage of the secured creditor than of any one else, as he takes the whole advance, and the others only benefit by a percentage, which does not seem a good reason for allowing him to prove for interest by indirection. Whenever the creditor proves, his security may be cut short. That is the necessarily possible result of bankruptcy. The rule under discussion fixes the moment in all cases at the date [on] which the petition is filed; but beyond the fact of being compelled to realize his security and look for a new investment, there is no other invasion of the secured creditor's contract rights, and that invasion is the same in kind whatever moment may be fixed.

It is suggested that the right of a creditor having security for two claims, one provable and the other unprovable, to marshal his security against the unprovable claim (see Hiscock v. Varick Bank, 206 U. S. 28, 37, 51 L. ed. 945, 951, 27 Sup. Ct. Rep. 681), is inconsistent with the rule applied in this case. But that right is not affected by fixing a time for winding up, and the bankruptcy law does not touch securities otherwise than in this unavoidable particular. The provision in § 57*h* for converting securities into money according to the terms of the agreement has no appreciable bearing on the question. Apart from indicating, in accordance with § 67*d*, that liens are not to be affected, it would seem rather to be intended to secure the right of the trustees and general creditors in cases where the security may be worth more than the debt. The view that we adopt is well presented in the late Judge Lowell's work on Bankruptcy, § 419; seems to have been entertained in Coder v. Arts, 15 L. R. A. (N. S.) 372, 82 C. C. A. 91, 152 Fed. 943, 950 (affirmed without touching this point, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008), and is somewhat sustained by analogy in the case of insolvent banks (Merrill v. National Bank, *supra;* White v. Knox, 111 U. S. 784, 787, 28 L. ed. 603, 604, 4 Sup. Ct. Rep. 686).

Interest and dividends accrued upon some of the securities after the date of the petition. The English cases allow these to be applied to the after-accruing interest upon the debt. Ex parte Ramsbottom; Ex parte Penfold; and Quartermaine's Case,—*supra.* There is no more reason for allowing the bankrupt estate to profit by the delay beyond the day of settlement

than there is for letting the creditors do so. Therefore to apply these subsequent dividends, etc., to subsequent interest, seems just.

Decrees reversed.

E. Claims Having Priority

In re ROUSE, HAZARD & CO.

91 Fed. 96, 33 C. C. A. 356

(Circuit Court of Appeals, Seventh Circuit. January 3, 1899)

JENKINS, Circuit Judge, delivered the opinion of the court. * * * It appears that on the 1st day of November, 1898, an involuntary petition was filed in the court below against Rouse, Hazard & Co., a corporation existing under the laws of the state of Illinois, and that on the 11th day of November, 1898, that corporation was adjudicated a bankrupt; that on the 5th day of November, 1898, a petition was filed in the court below by a large number of workmen, laborers, and servants of Rouse, Hazard & Co., asking for the payment of their labor claims accruing to them prior to the filing of the petition, and that such claims be awarded priority in payment out of the bankrupt's estate. Rouse, Hazard & Co., on the 31st day of August, 1898, suspended business, its property on that date being seized by the sheriff of Peoria county, Ill., under executions issued upon judgments rendered against the corporation in the courts of the state of Illinois, and such property remained in the possession of the sheriff until it was sold by him, and the proceeds, under order of the bankrupt court, turned over to the temporary receiver appointed under the bankruptcy proceedings. The labor claims in question accrued within three months prior to August 31, 1898, the date upon which the corporation bankrupt suspended business by reason of the levy of the executions, none of the services for which payment was sought being rendered after that date. Specific objections were filed by certain general creditors to the allowance of priority of payment of these claims, and upon the hearing in the bankruptcy court it was ordered that the claims for wages as shown by the receiver's report be approved as preferred claims, not exceeding by any one claimant the sum of $300, and that such claims should be paid out of the bankrupt's estate in preference and priority to the general creditors. It is this direction for the pay-

ment of labor claims in priority to the general creditors that is asked to be reviewed here as a question of law.

The bankrupt law (c. 7, § 64*b*) provides that:

"The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt's estate, and the order of payment shall be * * * (4) wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant. (5) Debts owing to any person, who by the laws of the states, or of the United States, is entitled to priority."

The laws of the state of Illinois with respect to voluntary assignments provides (Rev. St. Ill. 1898, p. 172, c. 10, § 6):

"That all claims for the wages of any laborer or servant, which have been earned within the term of three months next preceding the making of such assignment, and which have been filed within said term of three months after such assignment, and to which no exception has been made, or to which exception has been made and the same having been adjudicated and settled by the court, shall, after the payment of the costs, commissions and expenses of assignment, be preferred, and first paid to the exclusion of all other demands and claims."

By c. 38*a*, p. 629, Rev. St. Ill. 1898, it is provided:

"That hereafter, when the business of any person, corporation, company or firm shall be suspended by the action of creditors, or be put into the hands of a receiver or trustee, then in all such cases the debts owing to laborers and servants which have accrued by reason of their labor or employment, shall be considered and treated as preferred claims, and such laborers or employés shall be preferred creditors, and shall be first paid in full, and if there shall not be sufficient to pay them in full the same shall be paid from the proceeds of the sale of the property seized."

* * * * * * * * *

Coming, then, to the merits, it may be remarked by way of preface that the several provisions of the law of the state of Illinois with respect to the priority of payment to be allowed labor claims are not altogether consistent. In the case of voluntary assignments, the claim of the laborer which is preferred must have accrued within three months next preceding the making of the assignment. In the case of a suspension of business by action of creditors there is neither limit as to time nor as to amount. The reason of the distinction is not easy to understand. It is also to be observed that the Bankrupt Court whose order is here under

review proceeded upon the theory that § 64*b*, cl. 4, applied as to the amount, but did not apply as to time. Singularly enough, priority of payment of claims was allowed upon the theory that the provision of § 64*b*, cl. 5, governed, and that, notwithstanding the previous provision, wherever the laws of a state granted priority with respect to payment of labor claims, those laws must be recognized and followed. Yet here the Bankrupt Court has allowed priority with respect to these claims without regard to limitation of time, but has imposed the limitation of the bankrupt act with respect to amount when the law of the state under which priority was allowed contains no such limitation.

The question here is one of construction of the bankrupt law of the United States, and is this: whether the congress, having spoken by a particular provision (§ 64*b*, cl. 4) with respect to the priority to be allowed labor claimants, and having subsequently in the same act (§ 64*b*, cl. 5) spoken generally with respect to the recognition of the priorities allowed by the laws of the state or the United States, the latter general provision overrides or enlarges the prior special provision. The bankrupt act, by its terms, went into full force and effect upon its passage, July 1, 1898; and * * * was operative from the date of its passage, and was effective from that date to supersede the insolvency laws of the several states. Manufacturing Co. v. Hamilton (Mass.) 51 N. E. 529; Blake v. Francis-Valentine Co., 89 Fed. 691; In re Bruss-Ritter Co. (E. D. Wis.) 90 Fed. 651. * * * What was the real intention of the congress as expressed in clauses 4 and 5 of § 64*b*? In the first clause congress addresses itself to the subject of labor claims, and particularly provides that all wages that have been earned within three months before the date of the commencement of proceedings in bankruptcy, not to exceed $300 to each claimant, shall be awarded priority of payment. It recognized, it must be assumed, the various provisions of law in the several states with respect to this subject. It found them not to be in harmony, and in some states—as, notably, Illinois—the laws upon that subject not to be consistent with each other. It found limitation as to time different in the different states. It found that in some of the states priority of payment was unlimited as to amount, and in some limited to so small a sum as $50. With this divergence within its knowledge, the congress spoke to the subject specially and particularly, and limited the amount to $300, and, as to time, to wages earned within three months before the commencement of proceedings. Can, then, the general pro-

vision of the law following immediately thereafter, allowing priority of payment for all debts owing to any person who, by the laws of the states or the United States, is entitled to priority, be held to enlarge the prior provision so that the statute should be read that, in any event, the laborer should be entitled to priority of payment in respect of wages earned within three months prior to proceedings, and in amount not exceeding $300, and that wherever the laws of the state of the residence of the bankrupt grant the laborer priority of payment without limit as to time or amount, or impose a limit in excess of that imposed by the bankrupt act, he shall be entitled to a further priority in payment according to the law of the particular state? We think not. It is not to be supposed—unless the language of the act clearly so speaks—that the congress intended that in the administration of the act there should be a marked contrariety in the priority of payment of labor claims dependent upon locality. It is an elementary principle of construction that where there are in one act or in several acts contemporaneously passed specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same act. See Suth. St. Const. § 158. Thus, in State v. Inhabitants of Trenton, 38 N. J. Law, 67, it is said: "When the intention of the lawgiver, which is to be sought after in the interpretation of a statute, is specifically declared in a prior section as to a particular matter, it must prevail over a subsequent clause in general terms, which might, by construction, conflict with it. The legislature must be presumed to have intended what it expressly stated, rather than that which might be inferred from the use of general terms." * * *

Our conclusion is that congress having spoken specifically to the subject of priority of payment of labor claims, what it has said upon that subject expresses the particular intent of the lawmaking power, and that provision is not to be tolled or enlarged by any general prior or subsequent provision in that act. That which is given in particular is not affected by general words. So that the statute providing for the priority of payment of debts referred to in clause 5 must be construed to mean other debts and different debts than those specified in clause 4. We are not unmindful of the particular hardship which our conclusion, it is said, will work out here. It arises from the fact that under the law proceedings in bankruptcy, except by voluntary act of the bankrupt, could not be commenced in time to fully protect

these labor claimants. We regret that this is so. It is a misfortune arising from the provisions of the act, but to remedy this particular wrong we cannot override a recognized canon of construction of statute law.

The prayer of this petition must be allowed, and the order of the District Court, * * * so far as it allows priority of payment to labor claims which accrued prior to the 1st day of August, 1898, must be set aside, and held for naught. * * *

SHROPSHIRE, WOODLIFF & CO. v. BUSH et al.

204 U. S. 186, 51 L. ed. 436, 27 Sup. Ct. 178

(United States Supreme Court. January 7, 1907)

Mr. Justice MOODY delivered the opinion of the court:

The appellees are trustees of the bankrupt estate of the Southern Car & Foundry Company. The appellants, before the commencement of the proceedings in bankruptcy, acquired by purchase and assignment a large number of claims for wages of workmen and servants, none exceeding $300 in amount, and all earned within three months before the date of the commencement of the proceedings in bankruptcy. The District Court for the eastern district of Tennessee rendered a judgment disallowing priority to these claims, because, when filed, they were not "due to workmen, clerks, or servants."

On appeal to the Circuit Court of Appeals for the sixth circuit that court duly certified here for instructions the following question:

"Is an assignee of a claim for wages earned within three months before the commencement of proceedings in bankruptcy against the bankrupt debtor entitled to priority of payment, under § 64 (4) of the bankrupt act, when the assignment occurred prior to the commencement of such bankruptcy proceedings?"

The question certified has never been passed upon by any Circuit Court of Appeals, and in the District Courts the decisions upon it are conflicting. Re Westlund, 99 Fed. 399; Re St. Louis Ice Mfg. & Storage Co., 147 Fed. 752; Re North Carolina Car Co. [*semble*], 127 Fed. 178, where the right of the assignee to priority was denied; Re Brown, 4 Ben. 142, Fed. Cas. No. 1,974 [act of 1867, 14 Stat. at L. 517, c. 176]; Re Harmons, 128 Fed. 170, where, on facts slightly but not essentially different, the right of the assignee to priority was affirmed.

The bankruptcy law (act July 1, 1898, 30 Stat. at L. pp. 544, 563, c. 541, U. S. Comp. Stat. 1901, p. 3447), in § 1, defines "debt" as including "any debt, demand, or claim, provable in bankruptcy." § 64, under which priority is claimed in this case, is, in the parts material to the determination of the question, as follows:

"§ 64. Debts which have priority.— * * * b. The debts to have priority, except as herein provided, and to be paid in full, out of bankrupt estates and the order of payment, shall be * * * (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; * * *"

The precise inquiry is whether the right of prior payment thus conferred is attached to the person or to the claim of the wage-earner; if to the person, it is available only to him; if to the claim, it passes with the transfer to the assignee. In support of the proposition that the right is personal to the wage-earner, and enforceable only by him, it is argued that it is not wages earned within the prescribed time which are given priority, but wages "due to workmen, clerks, or servants;" that when the claim is assigned to another it is no longer "due to workmen, clerks, or servants," but to the assignee; and therefore, when presented by him, lacks one of the characteristics which the law makes essential to priority. In this argument it is assumed that the wages must be "due" to the earner at the time of the presentment of the claim for proof, or, at least, at the time of the commencement of the proceedings in bankruptcy. Without that assumption the argument fails to support the conclusion. But the statute lends no countenance to this assumption. It nowhere expressly or by fair implication says that the wages must be due to the earner at the time of the presentment of the claim, or of the beginning of the proceedings, and we find no warrant for supplying such a restriction. Regarding, then, the plain words of the statute, and no more, they seem to be merely descriptive of the nature of the debt to which priority is given. When one has incurred a debt for wages due to workmen, clerks, or servants, that debt, within the limits of time and amount prescribed by the act, is entitled to priority of payment. The priority is attached to the debt, and not to the person of the creditor; to the claim, and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but,

on the other hand, enumerates classes of debts as "the debts to have priority."

In this case the Southern Car & Foundry Company had incurred certain debts for wages due to workmen, clerks, or servants, which were earned within three months before the date of the commencement of proceedings in bankruptcy. These debts were exactly within the description of those to which the bankruptcy act gives priority of payment, and they did not cease to be within that description by their assignment to another. The character of the debts was fixed when they were incurred, and could not be changed by an assignment. They were precisely of one of the classes of debts which the statute says are "debts to have priority."

The question certified is answered in the affirmative, and it is so ordered.

In re McDAVID LUMBER CO.

190 Fed. 97

(District Court, N. D. Florida. September 25, 1911)

SHEPPARD, District Judge. This cause comes here for consideration on petition of Wm. F. Lee for review of the ruling of C. L. Shine, Esq., referee in bankruptcy, and involves the question of priority of liens attaching to the lumber and other products of a sawmill plant in due course of administration in a court of bankruptcy.

The McDavid Lumber Company, bankrupt, was lately engaged in manufacturing lumber and operated a large plant when proceedings in bankruptcy were begun. The company was adjudicated a bankrupt in June, 1910. Wm. F. Lee was employed as bookkeeper for the company, and by his petition before the referee sought to declare his lien on the stock of lumber and fixtures of the company for wages due him for the month of April and a part of May, 1910, at the rate of $115 per month. It is disclosed by the petition that the stock of lumber, the greater portion of which was produced during Lee's employment, comprised the principal assets of the company. Three months prior to Lee's employment, to wit, on January 10, 1910, the McDavid Lumber Company executed a chattel mortgage, based upon the present consideration of $1, to the Hayward Export Company, embracing all the lumber and timber of whatsoever kind which

expenses of such corporations are recognized by the courts as a first lien on the property of such corporations. Burnham v. Brown, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. ed. 596; Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. ed. 458.

What substantial reason would justify any distinction in the protection the law secures to the flagman of the railroad train whose wages are preferred over the interest of the bondholder, and the laborer in the sawmill whose handiwork is a constructive force in the product of the plant, which not only pays the interest on the mortgage, but returns the investment?

That sound legal philosophy established by numerous and powerful decisions of the Supreme Court recognizing the priority of labor engaged in the service of quasi public corporations because of the public convenience and necessity of continued operation, fortunately, is being gradually and wisely extended to the legal preservation of the rights of the laborer whose toil produces the output which pays the interest and enhances the value of the mortgage security. L'Hote v. Boyett, 85 Miss. 636, 38 South. 1; Dickinson v. Saunders, 129 Fed. 20, 63 C. C. A. 666.

It was well said by the Court of Appeals of the First Circuit, in Dickinson v. Saunders, *supra,* discussing the effect of the federal bankruptcy act regulating priority:

"Turning, therefore, either to the local statute, or to what for the federal courts is the higher authority, the bankrupt act, the priority in favor of creditors of the class of interveners in this case is declared as a rule of administration, not only for quasi public corporations, but for all corporations, and in the federal statute for corporations and individuals."

It was further observed by the learned court in this instructive case that the statute of Massachusetts could not control administration in bankruptcy in the federal court.

When the order of distribution of a bankrupt estate has been expressly laid down by Congress that order should be observed by the federal court in administration in bankruptcy. As said by Collier in his admirable work on Bankruptcy ([7th ed.] 742):

"The bankrupt act not only controls the state law in case of absolute conflict, but by its express legislation on these priorities excludes the state law altogether."

And again, as said by Judge Lowell, when both a state statute

and the bankrupt act gives priority to the same class of debts, the bankrupt act supersedes the state law. Dickinson v. Lewis, 129 Fed. 20, 63 C. C. A. 666; In re Lewis (D. C.) 99 Fed. 935; In re Erie Lbr. Co. (D. C.) 150 Fed. 823; In re Tebo (D. C.) 101 Fed. 420.

It is clear that the trust fund arising from the administration is distinctly charged by the act in favor of wages to the extent provided by § 64b, and, if it cannot be said to constitute technically a lien, its effect is tantamount to any claim or privilege created by state statute. It will not be denied that, where liens have attached before bankruptcy administration and are not dissolved by the act, they will be respected as criteria in the order for distribution of the estate, except preferred claims under the bankruptcy act which unquestionably supersedes the state law. In re Laird, 109 Fed. 557, 48 C. C. A. 538. It should be the policy of the law and the primary duty of society to protect the wages of the laborer in every contingency. Congress has indicated its purpose, and courts should declare the law.[17]

SECTION III

THE TRUSTEE

A. Appointment

In re EAGLES

99 Fed. 695

(District Court, E. D. North Carolina. February 16, 1900)

PURNELL, District Judge. The referee certifies for review the following record:

"I, C. C. Fagan, one of the referees in bankruptcy of said court, do hereby certify that the first meeting of the creditors herein was held in Tarboro, N. C., on February 12, 1900, at which claims were proven, and the election of a trustee entered upon; that nine (9) creditors, whose proven claims amounted to two thousand and eighty-four and $^{97}/_{100}$ dollars, voted for Stamps Howard, Esq., as trustee, and twenty-six (26) creditors, whose proven claims amounted to two thousand and eight hundred and twenty-five and $^{52}/_{100}$ dollars, voted for Henry Gillaim,

17—See the discussion of the subject in 78 Cent. L. Jour. 313.

Esq., as trustee; that questions arose as to the right of Howard & Co. and George Howard to vote, in the selection of the trustee, $712 due the former, and $1,000 due the latter, both of which claims are reported and proven as secured by the assignment of collaterals of bankrupts, fully set forth in schedule; that question also arose as to who was entitled to vote a certain indebtedness duly proven by B. F. Eagles, and due him by Eagles and Crisp, bankrupts, for $2,886.36, and which is hypothecated with George Howard as collateral security for the sum of one thousand dollars, the amount due and secured to George Howard as above. Howard & Co. and George Howard claimed the right to vote their debts of $712 and $1,000 in the election of a trustee, and offered to vote the same for Stamps Howard, Esq. The referee was of opinion that the said creditors, being secured by collaterals, were not entitled to participate in the selection of a trustee, unless they first surrendered their securities. George Howard claimed the right to vote the debt of $2,886.36 due to and proven by B. F. Eagles, and deposited with him as collateral security for $1,000 due by bankrupts as aforesaid, and offered to vote the said indebtedness for Stamps Howard as trustee. B. F. Eagles, to whom the debt is due, claims the right to vote said indebtedness, and offers to vote the same for Henry Gillaim, as trustee. The referee was of opinion that B. F. Eagles was entitled to vote said indebtedness in the selection of a trustee, and the same was voted for Henry Gillaim. The referee declared Henry Gillaim duly elected trustee, and fixed his bond at the sum of $2,500. Attorneys for the said Howard & Co. and George Howard object to the above rulings and decision of the referee, and ask that the same be certified to the judge of the district court for review."

It would not be inappropriate for referees to follow the familiar practice of "explaining the object of the meeting" to creditors and attorneys not familiar with the practice in the courts of bankruptcy. Many questions similar to those presented may thus be solved, thus saving time, frequently so essential in a proper adjustment of estates. The meeting is for business, and must be held in strict accordance with the notice, at the time and place specified, not at some other time, sooner or later, or another place, though near by. Adjournments may be had if the business requires it, but all adjournments are the same meeting, in contemplation of law. If no creditor appears, the meeting is as effectual as if they were present or represented. The court,

judge, or referee is not authorized or required to wait for or "count a quorum." If, in such case, the schedules disclose no assets, the court may order that no trustee be appointed. Rule 15.

The referee should be punctually present at the time and place specified in the notice. He or the judge presides, and his duties are judicial. He does not otherwise participate. The bankrupt is required and should be actually present at the first meeting. It is a creditors' meeting, and they (the referee and bankrupt) are there to assist the creditors,—the first as an officer of the law, and the other to aid him in so doing. Thus aided, the referee should, in most cases, be able to pass upon all claims which have been or may be presented at the meeting. Bankr. Act, § 55c. Having thus passed upon the claims presented, a creditor to participate in and vote at such meeting must own an unsecured claim, provable in bankruptcy, and must not only have proved such claim, but had it allowed. Id. §§ 56a, 56b; In re Hill, Fed. Cas. No. 6,481; In re Altenheim, Id. 268. Secured creditors cannot vote at such meetings, unless their claims exceed the amount of the security held by them, and then only for such excess as shall be allowed by the court. Bankr. Act, § 56b. An attorney, agent, or proxy can represent and vote for such creditors, but, before being permitted to do so, should be required to produce and file written authority from the creditor, which should be filed by the referee as a part of his record. In re Sugenheimer (D. C.) 91 Fed. 744. Creditors holding claims which are secured or have priority are not, in respect to such claims, entitled to vote. To do so, such security or priority must be surrendered. In re Saunders, Fed. Cas. No. 12,371; Bankr. Act, § 57g; In re Conhaim (D. C.) 97 Fed. 924. This provision illustrates the homely maxim, of Heywood, hoary with the age of over four centuries, that one cannot eat his cake and have his cake too. The creditor must decide. He can make a surrender, thus becoming an unsecured creditor, and participate with other creditors in the management of the estate, or he can stand on his security or priority. He cannot do both. He cannot run with the hare and hold with the hounds, as boys who run rabbits would express it, quoting a sixteenth century authority.

Assisted as indicated by the schedules, the bankrupt, and others interested, creditors present, it would seem the court could pass on all or most of the claims without difficulty or delay. If

a particular claim is objected to, the question should be heard as soon as feasible, and, if the court (judge or referee) is not satisfied with the weight of evidence, the hearing may be postponed, and heard at some subsequent time. The act of 1867 provided expressly for such postponement, and the act of 1898 does not prohibit, but, by lodging a large discretion in the court, warrants and contemplates it. On a decision, the allowance or rejection of a claim of $500 or over, both may be reviewed by the court of appeals. Bankr. Act, § 25, subd. 3. The effect of allowing or postponing the hearing on a particular claim affects only the creditor's right to vote at the first meeting of creditors. If made to appear the result would be changed by such vote or votes, the judge or referee may set aside the result, and order a new vote to be taken. When it appears the right to vote would not affect the business of the estate, the proceedings would not be disturbed to allow a creditor to exercise the right to vote when it would be barren of results. A creditor who has received a preference must surrender such preference before he can participate in a meeting of creditors. By the adjudication, the estate of the bankrupt is in the custody of the court. If the preference is by the assignment of securities, the creditor cannot realize on such securities, or release the debtor of the bankrupt, except through the bankrupt court. See In re Cobb (D. C.) 96 Fed. 821, and authorities cited. Such creditor should prove and file his claim, and his preference, if valid, will be protected by the court, but he cannot participate in meetings as an unsecured creditor. In a proceeding like the one at bar, the creditors of the partnership elect the trustee, but an individual creditor of one of the partners cannot vote for a trustee of the partnership. Bankr. Act, § 5b.

Applying the foregoing principles, which are thus fully discussed for the benefit of referees, to the case at bar, the rulings of the referee are affirmed. The claim of $712 due Howard & Co., and that of $1,000 due George Howard, "reported and proven as secured by the assignment of collaterals of bankrupt, fully set forth in schedule," are not such claims as would entitle the creditor holding such claim to participate in the first meeting of creditors or vote for a trustee.

The question propounded, but not presented in such a way as to be properly passed upon, as to who is entitled to vote the claim of B. F. Eagles, due him by Eagles and Crisp, bankrupts, for $2,886.36, may be settled by an answer to the question, was

such claim allowed? If not, no one can vote it. B. F. Eagles was a member of the bankrupt firm, and schedules his individual property. § 5*g* of the bankrupt act provides:

"The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

The schedules disclose the fact that the $1,000 debt due George Howard by B. F. Eagles, partner, is secured by the hypothecation of a note of A. H. Crisp (not of the bankrupt firm), which note is secured by real-estate mortgage and other collaterals. Other questions as to this claim may arise hereafter, which are not now presented for review, as contemplated by the bankrupt act, and even the question of who is entitled to prove and vote the claim is not so presented. Howard cannot prove or vote the claim, for he does not own it. It is only assigned as collateral security. If, when reduced to money, the proceeds are in excess of his claim, which he cannot vote, the excess would, in a marshaling of assets, go to the estate, and, if not sufficient to satisfy his claim, then he would be entitled to prove, as an unsecured creditor, any excess. How this may be cannot now be determined. B. F. Eagles cannot prove the claim, because he does not own it. *Aliunde* the bankrupt proceedings, he would own an equitable interest, but has assigned the legal title to the claim. Nor does the report of the referee and the schedules correspond in some essential particulars as to this claim. Only the right to prove and vote the claim, which is not properly presented, is now considered, and the many questions which may arise are not intended to be passed upon. It will be in apt time to adjudicate such questions should they arise in the course of the administration of the estates of the firm and the partners.

It is impossible to say from the report which claims are included in the vote for trustee. If the claims not entitled to vote were included in the vote for Mr. Gillaim or Mr. Howard, they must be eliminated, and the one who thus has a majority in number and amount of the claims proved and allowed will be declared trustee. Such trustee will at once file the bond fixed by the creditors, and proceed with the administration of the estate according to the statute.

In re SYRACUSE PAPER & PULP CO.

164 Fed. 275

(District Court, N. D. New York. October 5, 1908)

RAY, District Judge. The petition in bankruptcy was filed in this case June 17, 1908, not August 17, 1908, as stated in the petition of review. On the same day, on all the papers and a full hearing and examination of Geo. W. Driscoll as to his connection with and relations to the alleged bankrupt, this court appointed Frank P. Hakes, of Cortland, N. Y., a person selected by the court because of his known integrity, long business experience, education, and good judgment, and entire disassociation with said alleged bankrupt and its officers, and said Driscoll, receivers of the estate of said paper and pulp company. I then was and still am of the opinion that some one fully acquainted with the operations and business of the company should be associated in the administration and winding up of its affairs. Soon thereafter, and early in July, an order was made for the examination of the officers of the alleged bankrupt and a full and complete inspection of its books and papers, to commence, as my recollection serves, July 20, 1908. This order was made on application of Mr. Stoltz, who represented certain creditors, including those, or some of those, who now object. This was done to enable a full discovery, so far as practicable, in advance of the election of a trustee. This afforded every opportunity to ascertain the real creditors of the bankrupt, etc. All the claims voted on and questioned here were included in the schedules and appeared on the books of the company. If there was valid objection to these claims in question here, or any one of them, it would have been easy to prepare in advance, or on the day of the first meeting of creditors, properly verified objections to the claims, which could have been filed on that day.

The first meeting of creditors was duly called and held on the 5th and 6th days of August, 1908. At that meeting there was a lively contest over the appointment of trustees. Three tickets were in the field. One ticket was for the appointment of three trustees, and the others for the appointment of one trustee. The minutes of the meeting show that some informal proofs were rejected; but no question is raised as to the propriety and legality of such action. One hundred and sixty-six votes were cast for each ticket, and Frank P. Hakes of Cortland, Frank M. Bos-

worth, of Watertown, and George W. Driscoll, of Syracuse, on one ticket, received 85 votes each, representing $215,380.04 of the proved and allowed claims; William A. McKenzie, Jr., on another ticket, received 6 votes, representing $12,806.08; and Geo. D. Chapman, on another ticket, received 75 votes, representing $112,-173.52 of such claims. It is seen that Hakes, Bosworth, and Driscoll had a clear majority of 4 over all and a plurality of 10 over Chapman. The intelligence and general character and ability of Mr. Driscoll cannot be questioned. Hakes and Bosworth are pre-eminently fit for the place; Bosworth being skilled in the business he is to care for and settle, and Hakes having proved his ability and integrity while acting as receiver. From the fact that Heath and Stoltz represented creditors, or were able to control the votes of creditors, to the number of 75, it is evident they had been working up the election of Chapman. Mr. Heath, or Mr. Stoltz, or both, orally objected to the following claims: Hannawa Falls Water Power Co., $7,299, on the ground it was a claim against other companies, or one of two other companies. Commercial National Bank, $6,802.37, on ground it had, with knowledge of insolvency, received a preferential payment within four months. National Bank of Auburn, $25,159.69, on same grounds. Salt Springs National Bank, $7,563.69, on same ground. Salt Springs National Bank, $9,139.50, same ground. Jefferson County National Bank, $15,523, same ground. Utica Trust & Deposit Company, $3,976.19, same ground. State Bank of Syracuse, $77,181.15, same ground. Skaneateles Railway Company, $1,920, on ground services were rendered to Rose & Moses Pulp & Paper Company. Rose & Moses Paper & Pulp Company, $36,536.02, on ground it is not a provable claim, and bankrupt not indebted to it in any sum whatever. Pottsdam Paper Mills, $3,941.46; George W. Phelps, $1,792.25; George W. Phelps, $575.75; G. Wittner, $8,100.97; Battle Island Paper Company, $12,585.99; John C. Lutz, $2,840—and also numerous small claims, on the general ground, in nearly every case, that it was not a provable claim, and that alleged bankrupt was not indebted to the claimant in any sum, and frequently was added the objection that a preference had been paid and received with knowledge of insolvency. These general oral objections, not reduced to writing, or signed by any one, or verified, were made to substantially every claim voted in favor of Hakes, Bosworth, and Driscoll.

The objections having been made and overruled, no offer hav-

ing been made to substantiate the objections by proof, and nothing appearing tending to impeach the validity of the claims, the referee announced that the election of a trustee was in order. Mr. Heath then objected to the election of a trustee on the ground that he had a right to have the claims to which he had objected, and where his objections were overruled, heard upon the evidence, and requested an adjournment for that purpose. This was an objection to proceeding to the election of a trustee without an adjournment. No evidence was offered to sustain the objections, and there was no claim made that evidence, if any, to sustain the objections was not then at hand. The referee ruled that to try out the objections would take more time than was at his disposal, and overruled the objection. This was equivalent to denying an adjournment for the purpose of trying the various and numerous objections on the merits. It was evident to the referee, and is evident to the court, that to have taken time to try out the question of the validity of these objections would have required weeks of time. The objections were not verified or reduced to writing. Evidently they were made at random and for purposes of delay. It was essential to the due administration of the estate that it proceed with reasonable diligence. The opportunity given for the examination of the officers and books of the company had developed nothing, so far as appears, against these claims. If so, that record could have been produced as a basis or ground for the objections. The claims, so far as allowed and voted upon, were regular upon their face and apparently valid. The claims stood proved, and were entitled to allowance, unless met and overthrown by proof. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. ed. 584, and cases there cited.

But the allowance of a claim is not final; for if, at a later time, it is desired to open it and try out its validity, it can be done. And it is the duty of the referee and judge to afford such a rehearing on a *prima facie* case. True, the trustee or trustees represent the creditors, and this reopening of a claim is done by the trustees; but if a creditor, one or more, makes a *prima facie* case, and asks the trustee to take measures for the opening of a claim, and he refuses, an appeal to the referee or court would effect the desired result, and perhaps result in the removal of the trustee. The referee, in the absence of verified objections, and in the absence of any offer of evidence to sustain the oral objections made, overruled the objections in most instances and pro-

ceeded to obey the statute, which is imperative that the trustee shall be elected or appointed by the creditors at their first meeting. Bankr. Act, July 1, 1898, c. 541, § 44, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438):

"The creditors of a bankrupt shall, at their first meeting after the adjudication * * * appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so."

I do not doubt that it is competent for the [referee] to adjourn this first meeting of creditors for a reasonable time, and from time to time when necessary, and in a proper case it is his duty so to do. But when it is apparent, as it was here, that certain attorneys in their own interest take it upon themselves to orally object to all, or substantially all, claims presented which may be voted against their nominee for trustee, and fail to file written and verified objections, or to offer then and there some evidence tending to support those made, and it is apparent that to try out the validity of such unsupported oral objections would unduly postpone the election of a trustee or trustees, it is the duty of the referee to obey the spirit and letter of the law and proceed with the election of a trustee. Any other course in such a case should not be tolerated. It is quite true that the creditors are to elect the trustee; but it is also true that at the first meeting they are to perform this duty, and that they should come prepared to act with reasonable expedition, and that these matters should not be dragged along on mere oral objections to verified claims apparently valid, and which are conceded by the bankrupt to be valid. And verified claims, presumptively valid, and which are entitled to probative force, which in effect prove themselves, should not be held up or denied allowance or participation in the election of trustees on mere oral objections in any case, unless some written evidence is placed before the court tending to impeach their validity, or some oral evidence is offered at the time having that tendency, or it is made to appear that such evidence exists, but cannot be then obtained and presented.

As the vote for trustee was being taken, objections were made to a vote being allowed on certain claims. The most of these objections, if not all, were clearly frivolous. A vote on the claim of Mr. Latterner was objected to on the ground that the claimant was an employé of the bankrupt company, and therefore not a proper person to vote for the election of a trustee. No such disability is imposed by the bankruptcy act or by common sense. It

might be that two-thirds of the creditors of the bankrupt company were employés of the concern. Are they to be debarred from voting on the suspicion that they may have a friendly feeling for the company which has given them employment? A vote on the claims of John C. Lutz was objected to on the ground that he was a stockholder in the corporation, and not a proper person to unite in the selection of a trustee. A vote on the claims of G. Wittner were objected to on the same ground, with the addition that he was also a director. The law imposes no such disability on the creditor of such a corporation who happens to be a stockholder or director therein, and there is no valid reason why he should be debarred from voting for trustee. * * * Cases may arise where the directors of a bankrupt corporation, also creditors thereof, may seek to control the election of the trustee in the interest of the bankrupt itself, and in opposition to the interests of the general creditors. In such a case I do not doubt that the referee or judge has the power to set aside such an election, if made; but it would be on other grounds than that the directors were not entitled to vote for the appointment of the trustee. In this case there was no combination of directors; no attempt to elect trustees in the interest of the bankrupt corporation. As stated, two of those elected and confirmed by the referee are men of the highest probity and business ability, and entirely disinterested; and the inclusion of Driscoll, familiar with all the books and affairs of the company, was wise and proper. Should he attempt to hide or cover the transactions, or balk proper legal proceedings, it would be ground of removal, and the referee should not hesitate to report the facts, and this court would speedily remove him.

It was suggested on the argument that there is a possibility that it will become the duty of the trustees to bring action against some or all the directors, including Driscoll, and that he, as trustee, cannot sue himself as director, or as an individual. There will be ample opportunity to cross that bridge when reached, if it ever is; but I am of opinion that a trustee as such may be party complainant or plaintiff as such, and also defendant as an individual. In this case Hakes and Bosworth may prosecute all necessary actions, making Driscoll as director or personally, or even as trustee, a party defendant, stating the necessity for such action. 1 Foster's Fed. Pr. p. 148, § 42; Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; Wisner v. Barnett, 4 Wash.

C. C. 631, 642, Fed. Cas. No. 17,914; Barry v. Missouri, etc. (C. C.) 27 Fed. 1, per Wallace, J.

The creditors and all of them are at liberty to examine the directors, including Driscoll, and if it shall develop that he is an improper person to act as trustee, or that his presence as such interferes with the due and proper administration of the estate, he can be removed. No self-respecting court would hesitate a moment to take such action. There was a clear majority in number and amount voting for Hakes, Bosworth, and Driscoll. I have examined all the cases cited, and find nothing that would require, or even justify, the setting aside of their appointment.

* * *

The order of the referee, affirming the action of the creditors, is therefore approved and affirmed.

B. Property Acquired

1. As of what time

JOHNSON v. COLLIER

222 U. S. 538, 56 L. ed. 306, 32 Sup. Ct. 104

(United States Supreme Court. January 9, 1912)

M. B. Johnson, as executor, recovered judgment against B. T. Collier, in the city court of Gadsden, Alabama. Execution thereon was levied July 20, 1906, on certain personal property.

Under a provision of the Alabama statute, Collier immediately filed with the sheriff a claim of exemption. On the same day he filed, in the proper District Court of the United States, a voluntary petition in bankruptcy, including this property in his schedule of assets. Notwithstanding the claim of exemption, the sheriff sold the property at public outcry on July 30, 1906.

Thereafter, on a date not shown by the record, Collier was adjudicated a bankrupt. On August 8, 1906, before a trustee was elected, he brought suit against both Johnson and the sheriff for damages, on the theory that the sale of the property after the filing of the claim of exemption made them trespassers *ab initio*. The defendants filed a plea, in which they set up the pendency of the bankruptcy proceedings, and alleged that Collier had no title to the cause of action, which was *in gremio legis* until the election of the trustee, and for that reason he could not maintain a suit for damages occasioned by the unlawful sale

of property included in the schedule of assets. A demurrer to this plea was sustained. The jury found a verdict in favor of Collier, which the trial court refused to set aside. This ruling was affirmed, and the case is here on writ of error from that judgment of the Supreme Court of Alabama.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court:

The trustee, with the approval of the court, may prosecute any suit commenced by the bankrupt prior to the adjudication. (§ 11c.) But the statute is otherwise silent as to the right of the bankrupt himself to begin a suit in the time which intervenes between the filing of the petition and the election of the trustee. There is a conflict in the conclusions reached in the few cases dealing with this question. Rand v. Sage, 94 Minn. 344, 102 N. W. 864; Rand v. Iowa C. R. Co., 186 N. Y. 58, 116 Am. St. Rep. 530, 78 N. E. 574, 9 A. & E. Ann. Cas. 542; Gordon v. Mechanics' & T. Ins. Co., 120 La. 444, 15 L. R. A. (N. S.) 827, 124 Am. St. Rep. 434, 45 So. 384, 14 A. & E. Ann. Cas. 886.

While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes "vested by operation of law with the title of the bankrupt" as of the date of adjudication. (§ 70.)

Until such election the bankrupt has title,—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court, in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights

and priorities thereby acquired. Thatcher v. Rockwell, 105 U. S. 469, 26 L. ed. 950.

If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice. Rand v. Iowa C. R. Co., 186 N. Y. 58, 116 Am. St. Rep. 530, 78 N. E. 574, 9 A. & E. Ann. Cas. 542; Southern Exp. Co. v. Connor, 49 Ga. 415.

There was no error in holding that the bankrupt had title to the cause of action and could institute and maintain suit thereon.

Affirmed.[1]

STATE BANK OF CHICAGO v. COX

143 Fed. 91, 74 C. C. A. 285

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906)

This is a suit in assumpsit, by the trustee in bankruptcy, to recover assets of the bankrupt which were appropriated by State

1—"The complainant's counsel agrees that from the time of the adjudication until the appointment of a trustee the bankrupt is civilly dead, and that nothing that takes place in the meantime can deprive the trustee of his right to elect whether to accept any asset of the bankrupt or not. If that doctrine were true, the court would have no power to authorize any action whatever in respect to the assets of the estate until the trustee was appointed. It could not order a sale; it could not permit a delivery of property admitted not to belong to the bankrupt; it could not permit a business to be carried on; the adjudication would strike the estate with a complete paralysis until necessary weeks or the usual months had passed before the appointment of a trustee. There is nothing in the Bankruptcy Act which author-

Bank of Chicago, plaintiff in error, through attachment and garnishee process, pending the proceedings in bankruptcy; and the writ of error is from the judgment, upon verdict, for $2,692.36 against the bank. The bankruptcy proceedings were in the District Court of the United States for the Western District of New York, against Muskoka Lumber Company, a New York corporation, upon petition for involuntary bankruptcy filed August 20, 1901; and adjudication as a bankrupt was entered May 1, 1902. On August 21, 1901, the plaintiff in error commenced attachment proceedings against the bankrupt, in the Circuit Court of Cook county, Ill., under which property of the bankrupt was seized and certain of its creditors were served with garnishee process. The John S. Owen Lumber Company followed with another attachment, through the same attorneys, returnable at the same term, and thus became a prorating attachment creditor under the Illinois statute. § 37, c. 11, 1 Starr & C. Ann. St. 1896 (2d ed.). Through the attachment on the part of the plaintiff in error the sheriff collected $286.13 and the garnishees paid $2,014.52. Of this aggregate it appears that the share actually received was $1,902.78; the remainder being costs and pro rata share of the other attaching creditor. The trustee in bankruptcy brought the present action, against the plaintiff in error alone, May 11, 1903, no claim having been filed or appearance entered on its part in the bankruptcy proceedings, and various questions of pleading were raised, which involve no substantial controversy not otherwise presented for review, aside from jurisdictional features which are referred to in the opinion. Upon issues joined, with the substantial facts undisputed, the case was tried and resulted in a verdict, directed by the court, against the plaintiff in error for the entire amount so realized and interest, without deduction for the share of the prorating attachment.

SEAMAN, Circuit Judge (after stating the facts and disposing of matter of jurisdiction of the court below). * * *

The questions arise for review therefore: (1) Whether the trustee in bankruptcy establishes a right of recovery; and, if so (2) whether the true measure of damages was awarded. As

izes such a conclusion.'' Plant v. Gorham Mfg. Co., 174 Fed. 852, 858. See In re Pease, 4 Am. B. R. 578; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300.

the material facts are undisputed, the inquiry is within narrow compass, if not otherwise free from difficulty.

1. Upon the first question the contentions are twofold: (1) That under the present bankruptcy act (Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), the trustee is vested with title to the property of the bankrupt, "as of the date he was adjudged a bankrupt," so that he cannot recover for property theretofore attached and sold; and (2) that in any view, if such attaching creditor obtained no greater percentage than other creditors of like class, the proceeds were not recoverable as a preference. The attachment processes under consideration were instituted in Illinois on the day following the commencement of the bankruptcy proceedings in New York, but both attachment and appropriation of the proceeds were prior to the adjudication of bankruptcy, and the first-mentioned proposition is thus fairly involved.

The general purposes and scope of bankruptcy enactments, to take and administer all of the assets of the bankrupt for *pro rata* distribution to the unsecured creditors, is well recognized. In conformity with this view the provisions of the present act, alike with those of the former acts, are uniform—from § 1, cl. 10 (30 Stat. 544—[U. S. Comp. St. 1901, p. 3418]), to and including § 70, cl. 5, in fixing the date when the petition was filed as the time bankruptcy jurisdiction is established over the property then possessed by the bankrupt, as the date from which the sequestration of property becomes operative and with reference to which the validity or invalidity of the various transactions affecting the estate must be ascertained. As well remarked by Mr. Chief Justice Fuller, speaking for the Supreme Court, in Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. ed. 405:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403, 25 L. ed. 866), and on adjudication title to the bankrupt's property became vested in the trustee (§§ 70, 21*e*, 30 Stat. 565, 52 [U. S. Comp. St. 1901, pp. 3451, 3430]), with actual or constructive possession, and placed in the custody of the bankruptcy court."

In this court the view is clearly expressed in the opinion by Judge Jenkins, In re Rodgers, 60 C. C. A. 567, 578, 125 Fed. 169:

"The filing of the petition, followed by seizure and by ad-

judication in bankruptcy, is a seizure of the property by the law for the benefit of creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment."

In other words, it is the established doctrine that bankruptcy proceedings are *in rem*, and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the bankruptcy court, and that, when bankruptcy is adjudicated, the sequestration reaches all such property at least, and becomes operative from the institution of proceedings, as "a *caveat* to all the world," preventing interference by attachments or other means in derogation of the interests of the estate. In re Pekin Plow Co., 50 C. C. A. 257, 259, 112 Fed. 308; Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 261, 264, 122 Fed. 593; Loveland's Bankruptcy (2d ed.) 366; Collier on Bankruptcy (5th ed.) 553. While title rests in the bankrupt up to adjudication, and in form until a trustee qualifies, it is subject to the pending sequestration, and no rights can be acquired thereunder which are not equally amenable. The formal title of the bankrupt to the estate passes to the trustee (§ 70*a*) "by operation of law" as of the date of adjudication, but the trustee is vested as well under subdivisions (4) and (5) with property transferred in fraud of creditors, and "property which prior to the filing of the petition" the bankrupt "could by any means have transferred" or which might have been levied upon and sold. Thus the narrow construction of the first-mentioned provision, which is sought for escape from liability for the plain violation of the act through the seizure in question, not only ignores these succeeding and comprehensive clauses, but it would nullify the terms and entire policy of the act for the protection of creditors against spoliation of estates subject to bankruptcy proceedings.

We are clearly of opinion that such rights of action, arising out of transactions prohibited by the act, vest in and are enforceable by the trustee, unaffected by the date when the legal title passes from the bankrupt to the trustee. In re Pekin Plow Co., 50 C. C. A. 257, 259, 112 Fed. 308; In re Garcewich, 53 C. C. A. 510, 513, 115 Fed. 87; In re Breslauer (D. C.), 121 Fed. 910, 914; Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 261, 265, 122 Fed. 593. The question is not raised in Clarke v. Larre-

more, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. ed. 555, but the recovery affirmed in that case could rest on no other view.

In reference to the further contention that the proceeds of the attachment and sale gave the plaintiff in error no percentage upon the indebtedness to it beyond that received by other creditors, and thus no preference in fact, it is sufficient to remark that the alleged cause of action does not rest upon the provision relating to preferences, but upon the prohibited seizure and appropriation of property of the estate vested in the court of bankruptcy for administration. Whether the amount realized was more or less than the percentage which might otherwise have been awarded the creditor cannot enter into consideration.[2]

2. KINDS OF PROPERTY

In re COFFIN

152 Fed. 381, 81 C. C. A. 507

(Circuit Court of Appeals, Second Circuit. February, 26, 1907)

This cause comes here upon petition to review an order of the District Court, District of Connecticut, enjoining the bankrupt from making any conveyances of certain real estate in western states, standing in his name, and directing him to turn over certain drafts and cash to the trustee in bankruptcy.

LACOMBE, Circuit Judge (after stating the facts). In 1890 a Nebraska corporation, the Real Estate & Live Stock Association, of which the bankrupt and his wife were stockholders, being financially embarrassed, sought a loan from its stockholders. The stockholders advanced $50,000 ($18.75 per share of their respective holdings), and took as security a mortgage upon numerous parcels of real estate in Nebraska and Wyoming. The mortgagee named in the instrument was one Alonzo Clark as trustee. The money not being paid, Clark brought suit in foreclosure, and under proper decree the real estate in Nebraska was sold and bought in by him and conveyance thereof made to

2—That part of the opinion dealing with the second question is omitted. Because of the damages having been measured improperly the judgment was reversed and new trial directed.

See Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945.

him by the "master commissioner under foreclosure proceedings." The real estate in Wyoming was bought in by Coffin. In November, 1900, Clark conveyed all the real estate to Coffin, who thereupon undertook to sell and dispose of the same and to distribute the proceeds ratably to the beneficiaries, for whom he was acting as trustee. Upon the sale of one parcel in Nebraska, the prospective purchasers questioned Coffin's title to the lands. Thereupon each of the parties interested and the association executed quitclaim deeds to Coffin of their respective interests in all said lands both in Nebraska and Wyoming. Moreover, a friendly suit was brought in Nebraska by Coffin against the association and all the other parties in interest to quiet the title, and decree was entered therein June 2, 1902, declaring that the title of Coffin in and to said lands was absolute as against any of the parties defendant. On or prior to that date the quitclaim deeds were all filed.

Subsequent to June 2, 1902, Coffin sold and conveyed from time to time portions of said real estate in both states, and received in payment therefor certain amounts of cash, which were deposited with his personal account in a bank in Middletown, and certain notes and mortgages which were taken in his individual name for part payment of such sales. From the amounts so received he paid between July 30 and October 30, 1902, to the parties who had advanced the funds to the association 30 per cent of the amount so loaned or advanced by them, together with 8 per cent interest thereon. Part of these payments were made in cash and part by the transfer to them of notes secured by mortgages received in part payment for the lands so sold. Subsequently to these payments there had accumulated a large sum over and above disbursements from sales of the land in question, which had been deposited in his bank account. On November 14, 1903, he drew his entire deposit ($4,800) from the bank, took $1,000 in cash which he kept in a drawer at his office, and added to it a draft of $1,915.86 which he had received from his agent in the West as proceeds of the sale of part of said lands, and bought a draft on New York to the order of himself as trustee of $7,715.86. This draft and some others sent from the West by said agent have come into the possession of the trustee in bankruptcy. On December 2, 1903, Coffin was adjudicated a bankrupt on his own petition.

Various technical matters have been eliminated during the

argument, and the single question is presented whether the several parcels of real estate yet unsold prior to December 2, 1903, were held by Coffin in trust for the beneficiaries, and therefore did not pass to his trustee in bankruptcy, or whether they were a part of his individual estate to be disposed of by the trustee for the benefit of his creditors. That question may appropriately be answered by this court. The bankrupt and the trustee (representing all the creditors) duly appeared. The record would seem to indicate that there was no appearance for the so-called "beneficiaries," who claim interest in the western lands, but it was asserted upon the argument that the record is defective in that respect, and, with the consent and concurrence of all parties, the beneficiaries formally entered their appearance in this court. It appears from the referee's findings of fact that credit was not given or extended by any creditors upon the strength of Coffin being the owner of the lands and property in question. This simplifies the situation, because under such circumstances the trustee in bankruptcy stands in no better position than that in which the bankrupt stood on the day the petition was filed, and it will be necessary only to determine whether, if there had been no bankruptcy, the beneficiaries could in a court of equity have established their right to have him dispose of these lands for their benefit and distribute the proceeds ratably among them.

The express trust created by the deeds to Clark as trustee and from Clark to Coffin, and resultant upon the furnishing of the money by the beneficiaries, was terminated by the delivery of the quitclaim deeds and by the entry of the decree of the Nebraska court on June 2, 1902. Coffin already held the legal title, and each quitclaim deed conveyed to him every right, title, and interest, legal and equitable, which the beneficiary executing it had to convey. At the close of this transaction Coffin was the absolute owner with no outstanding interest in and no resultant trust to any one. But, since the property was his absolutely, he was entirely free to do what he pleased with it. He could convey it to one, or more, or all of his fellow stockholders, or to a stranger. He could convey it to any one he chose in trust to make any disposition of it he might prescribe so long as such trust did not violate the law or the statutes of the state. He could make a declaration of trust which would constitute

himself the trustee for any such purpose. What did he do after he became the absolute owner on June 2, 1902? Were his acts such that as between himself and the other stockholders—to whom undoubtedly he owed a moral obligation to distribute a proportionate part of the proceeds—a court of equity would hold that he had created a new trust in their favor? It seems to us that, upon this record, such question must be answered in the affirmative.

In the first place we have the sworn statement of Coffin himself made June 15, 1904, that although he held the apparent legal title to the several parcels of land, the same was really in trust for the benefit of the several individuals whom he enumerated and called beneficiaries. This statement was made after bankruptcy, and no act of his at that time, no position which he might take, could alter the status established by the bankruptcy. But it is not as an act of the bankrupt that this statement of June 15, 1904, is important. It is an historical narrative of a transaction long prior to the bankruptcy, and, with such a sworn "declaration against interest" in the case, it is difficult to see how a court of equity could refuse such relief as would give the applicants the benefit of the trust which he thus declared he had created. Nor is this declaration a mere afterthought. Coffin's whole course of conduct shows that he considered himself a trustee for his fellow stockholders. The referee has found that between July 30 and October 30, 1902, he collected from the sale of these lands and distributed to them 30 per cent of the amounts originally advanced by them. Nor were his declarations merely oral. The referee finds that:

"In and about October, 1903, he wrote to some and made statements to others of the parties named in the petition, and therein called beneficiaries, that he soon hoped and intended to pay another dividend of from 30 to 40 per cent to claimants who had advanced funds to the Nebraska Real Estate & Live Stock Association, part of which was to be paid in cash and part with notes secured by mortgages on the land in question. See Exhibits 73 to 131."

Examination of the exhibits referred to shows that the declarations of Coffin as to the equities of the beneficiaries were much more explicit than the above quotation would indicate. Thus on August 2, 1902, he writes to one of the beneficiaries to

whom he had sent three notes received as part payment for a parcel of land just sold:

"A party in Nebraska has made me an offer of $950 for each $1,000 note, but I have replied that the notes are not mine. If you should wish to accept the offer, please so advise when returning the receipt."

No one can peruse these exhibits without being convinced that subsequent to June 2, 1902, Coffin undertook to manage these lands, to sell them, and to distribute the proceeds in the interest of all who had originally invested in the enterprise. No doubt the fact that there was such a trust was kept secret, so that no other prospective purchaser might question the title to any property he sold, but it was communicated to the others over Coffin's signature repeatedly, and, since the rights of no one else had supervened during this period of secrecy, a court of chancery would have enforced their equities had application been made to do so just before the petition in bankruptcy was filed. As the district judge expresses it, "the acts of Mr. Coffin after the decree [of June, 1902] undoubtedly put the stockholders in a position where they could, if there had been time, have established such a relation;" i. e., a trust relationship. That being so, the trustee in bankruptcy, who is not the grantee of the bankrupt for a valuable consideration, but a transferee by act of the law, who takes his property subject to all existing equities, cannot successfully dispute their right to establish such relationship in an appropriate tribunal. And, since all parties are here, this court may properly dispose of the controversy.

As to the various drafts referred to *supra*, the evidence is not sufficiently clear to enable us to determine how much of them represents proceeds of sales of land and how much represents general funds of the bankrupt. Upon remand of the cause the District Court will be able to determine those questions.

The order is reversed, and cause remanded, with instructions to the District Court to vacate the injunction which now prevents Coffin as trustee for the "beneficiaries" from continuing to sell this western land and to distribute the proceeds between them. As to the drafts and cash, disposition can be made of them in conformity with the views expressed in this opinion.[3]

3—See Carpenter v. Marnell, 3 B. & P. 40; In re Davis, 112 Fed. 129. *Cf.* In re Packing Co., 138 Fed. 625.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY v. HALL

229 U. S. 511, 57 L. ed. 1306, 33 Sup. Ct. 885

(United States Supreme Court. June 9, 1913)

Hall, a resident of Douglas county, Nebraska, was employed by the railroad as switchman in its yards in Omaha. His wages were exempt from garnishment by the laws of Nebraska. In July, 1907, he was insolvent, and in that month, while temporarily in the state of Iowa, two proceedings were instituted against him, in which he was personally served, and the railroad, which owed him $122 as wages, was garnisheed. In one of these cases Rawles sued on an open account for $54.20, the railroad being required to answer on August 10th. In the other, Torrey, holding a judgment for $22.40, rendered in 1894, served a summons of garnishment on the railroad, requiring it to answer on August 27, 1907.

While these proceedings were pending in the Iowa courts, Hall returned to Nebraska, and, on August 7, 1907, he was, on his own application, adjudged a bankrupt, his wages being claimed as exempt, and the two Iowa plaintiffs included in his list of creditors. Notice of the bankruptcy proceeding was given to them and to the railroad.

Thereafter, on August 10th, the railroad answered in the Rawles suit, admitting that it owed Hall $122, and a judgment was accordingly entered against the railroad as garnishee for $61.60. On August 27, it answered in the Torrey suit, and the court entered judgment against it as garnishee for $56.91. Hall, in the bankruptcy proceedings, had asked that, as allowed by the laws of Nebraska, his wages be set apart as exempt, and filed a petition praying that the railroad should be summarily ordered to pay him the amount due for work done in June and July, 1907. The application was resisted by the railroad and was denied by the court, which held, on the authority of Ingram v. Wilson, 60 C. C. A. 618, 125 Fed. 913, that the bankruptcy court could determine that the property was exempt, but had no jurisdiction to compel its payment.

In view of that ruling, Hall made a further application to have the $122 set off to him as exempt. An order to that effect was passed by the referee. Hall was discharged as a bankrupt in April, 1908, and then sued the railroad and recovered a judg-

ment, which was affirmed by the Supreme Court (88 Neb. 20, 128 N. W. 645), and the case was brought here.

Mr. Justice LAMAR, after making the foregoing statement of facts, delivered the opinion of the court:

Hall, a married man, head of a family, and insolvent, worked as a switchman for the railroad company in Nebraska, his wages being exempt from garnishment by the laws of that state. While temporarily absent in Iowa, two suits were there brought against him, summons of garnishment being served upon the railroad's agent in Iowa, where it had been held that the Nebraska exemption statute had no extra-territorial effect.

While these two suits were pending in Iowa, Hall returned to Nebraska, was adjudged a bankrupt, and claimed his wages as exempt. No defense was made to the Iowa suits, and in both cases judgment was entered against the railroad as garnishee. For this reason it refused to pay Hall when he demanded the money, which had been set apart to him as exempt by the referee. He then sued the company and recovered a judgment, which was affirmed by the Supreme Court of Nebraska. The railroad sued out a writ of error to test its liability in this class of cases, which it insists are constantly arising, because of the employment of many persons on its lines, extending into different states, with varying garnishment laws. It contends that the laws of Iowa do not recognize the Nebraska exemption of wages from garnishment; that Hall was personally served in the Iowa suits, and that the judgments therein entered against the railroad as garnishee are unreversed and binding; that to compel it to pay Hall and these Iowa plaintiffs also is to impose upon it a double liability, and to deny to the judgments of the Iowa courts the full faith and credit to which they are entitled under the Federal Constitution.

But if they were nullified by § 67*f* of the bankruptcy act, they are entitled to no faith and no credit. That they were so nullified is Hall's contention; for he insists that if there was a lien against his wages, it was obtained by garnishment served within four months of his bankruptcy, and discharged by virtue of the provisions of § 67*f*, which declares that "all * * * liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property af-

fected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass tc the trustee as a part of the estate of the bankrupt."

The railroad, on the other hand, contends that under § 70 the trustee acquires no title "to property which is exempt," and that liens thereon are not discharged by § 67*f*, since that section has reference only to liens on property which can "pass to the trustee as a part of the estate of the bankrupt."

On this question there is a difference of opinion, some state and Federal courts holding that the bankruptcy act was intended to protect the creditor's trust fund, and not the bankrupt's own property, and that therefore liens against the exempt property were not annulled even though obtained by legal proceedings within four months of filing the petition. Re Driggs, 171 Fed. 897; Re Durham, 104 Fed. 231. On the other hand, Re Tune, 115 Fed. 906; Re Forbes, 108 C. C. A. 191, 186 Fed. 79, hold that § 67*f* annuls all such liens, both as against the property which the trustee takes and that which may be set aside to the bankrupt as exempt.

This view, we think, is supported both by the language of the section and the general policy of the act, which was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt. Both of these objects would be defeated if judgments like the present were not annulled, for otherwise the two Iowa plaintiffs would not only obtain a preference over other creditors, but would take property which it was the purpose of the bankruptcy act to secure to the debtor.

Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four months' period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. "All liens obtained by legal proceedings" within that period are declared to be null and void. That universal language is not restricted by the later provision that "the property affected by the * * * lien shall be released from the same, and pass to the trustee as a part of the estate of the bankrupt." It is true that title to exempt property does not vest in the trustee, and cannot be administered by him for the benefit of the creditors. But it can "pass to the trustee as a part of the estate of the bankrupt," for the purposes named elsewhere in the statute, included in which is

the duty to segregate, identify, and appraise what is claimed to be exempt. He must make a report "of the articles set off to the bankrupt, with the estimated value of each article," and creditors have twenty days in which to except to the trustee's report. § 47 (11) and general orders in bankruptcy 17. In other words, the property is not automatically exempted, but must "pass to the trustee as a part of the estate,"—not to be administered for the benefit of creditors, but to enable him to perform the duties incident to setting apart to the bankrupt what, after a hearing, may be found to be exempt. Custody and possession may be necessary to carry out these duties, and all levies, seizures, and liens obtained by legal proceedings within the four months, that may or do interfere with that possession, are annulled, not only for the purpose of preventing the property passing to the trustee as a part of the estate, but for all purposes, including that of preventing their subsequent use against property that may ultimately be set aside to the bankrupt. This property is withdrawn from the possession of the trustee, not for the purpose of being subjected to such liens, but on the supposition that it needed no protection, inasmuch as they had been nullified.

The liens rendered void by § 67*f* are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained even after the petition in bankruptcy was filed, under the principle declared in Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751. But Hall did not waive his exemption in favor of the Iowa plaintiffs, and they had no right against his wages except that which was obtained by a legal proceeding within four months of the bankruptcy. Those liens, having been annulled by § 67*f* of the bankruptcy act, furnished no defense to the railroad when sued by Hall for his wages, earned in Nebraska, exempt by the laws of that state, and duly set apart to him by the referee in bankruptcy. The judgment of the Supreme Court of Nebraska is affirmed.[4]

4—Southern Pac. Co. v. I. X. L. Furniture, etc., House (Utah, 1914), 140 Pac. 665, *acc.*

LOCKWOOD v. EXCHANGE BANK

190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. 751

(United States Supreme Court. June 1, 1903)

In this proceeding, upon certain questions being certified by the United States Circuit Court of Appeals for the fifth circuit for decision by this court, a writ of *certiorari* was allowed, and the entire record has been brought up for consideration.

The controversy is fully set forth in the following "statement of case," embodied in the certificate of the Circuit Court of Appeals:

"On the 23d day of November, 1900, said Joel W. Lockwood was, on his application, duly adjudged a bankrupt by the District Court of the United States for the southern district of Georgia. On December 6, 1900, F. T. Rape was duly appointed trustee for said bankrupt; on the 16th day of December, 1900, the said F. T. Rape, trustee, set aside and designated as an exemption all of the property returned by the said bankrupt in his schedule of assets. On the 1st day of January, 1901, the Exchange Bank of Fort Valley, a creditor who had duly proven its debt as an unsecured claim, filed exceptions to the trustee's assignment of homestead and exemption, upon the following grounds:

"'(*a*) That said creditor held a contract against the bankrupt in which said bankrupt specially waived and renounced all right to the homestead exemption allowed by the laws of Georgia or the United States. Said waiver is contained in a note constituting contract of indebtedness, and was made in accordance with the provisions of the Constitution and laws of said state, authorizing and empowering the debtor to waive and renounce in writing his right to the benefit of the exemption provided for by the Constitution and laws of said state.

"'(*b*) That creditor's debt was unsecured, save and except so far as a waiver of homestead and exemption may be construed as a security.

"'(*c*) That the trustee has set apart all the property of said bankrupt returned by him in bankruptcy.

"'(*d*) Under the laws of Georgia, the debtor's exemption cannot be subjected to the payment of a debt containing a waiver of homestead except by putting said debt in judgment, and afterwards causing execution to issue thereon to be levied on the

exempt property, in accordance with the provisions of §§ 2850 *et seq.* of the Code of Georgia. If bankrupt court should approve trustee's assignment in this case, without reserving to petitioner the right to sue his claim and put same in judgment, and without itself giving judgment for said debt, creditor would be left without means of enforcing his rights created and arising out of the aforesaid waiver, and would be without remedy.

"'(*e*) Creditor therefore prays equitable relief and such decree as will protect his rights; that the homestead be set aside and trustee be required to take charge of and administer the property of said bankrupt so set apart, except so much as cannot be waived, for the benefit of creditors holding waiver contracts.'

"To these exceptions of the creditor the bankrupt duly filed a demurrer on the following grounds:

"'(*a*) That said exceptions are wholly insufficient in law to defeat the report of the trustee.

"'(*b*) That the exceptions made are not such as, under the laws of Georgia, will defeat the setting apart of the exemption, and furnish no reason why the trustee should not assign the exemption.

"'(*c*) That the bankrupt court has no jurisdiction over exempted property, and no authority to administer the same.

"'(*d*) That there is no authority of law for the exceptions made, nor for the relief sought.'

"The referee, Honorable Shelby Myrick, overruled the aforesaid demurrer, and directed the trustee to carve out of the said exemption of property a portion of the same, amounting to $300.00, which was to be free from the claims of all creditors. The residue of the exempted property was to be sold, and the proceeds held by the trustee for the benefit of creditors holding waiver notes. The bankrupt was ordered to yield possession to the trustee for the purpose of carrying out this order. The referee, at the request of bankrupt, certified the record in said case, together with his decision thereon, to the Honorable Emory Speer, judge of the District Court of said district, for final determination. On the 30th March, 1901, said case came on regularly to be tried before said district judge, and, after hearing argument of counsel, his honor Judge Emory Speer held and decided and adjudged the aforesaid exceptions to the determinations and report of the trustee be sustained, and that the exemptions set apart by the trustee in his said report be denied and refused to the said bankrupt, save and except the item of house-

hold furniture and wearing apparel, and that the said bankrupt was not entitled to an exemption as claimed by him, by reason of having waived and renounced in writing his rights thereto, in accordance with the Constitution and laws of the state of Georgia."

This judgment of the District Court is the one complained of, and which was sought to be revised in the Circuit Court of Appeals.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the court:

The general exemption of property from levy or sale, authorized by article 9, § 1, ¶ 1, of the present Constitution of the state of Georgia (that of 1877), is "realty or personalty, or both, to the value in the aggregate of $1,600." By article 9, § 3, ¶ 1, of the same Constitution, a debtor is vested with power to waive or renounce in writing this right of exemption, "except as to wearing apparel, and not exceeding $300 worth of household and kitchen furniture and provisions." The mode of enforcement of a waiver of exemption is provided for in § 2850 of the Code of 1895, reading as follows:

"In all cases when any defendant in execution has applied for and had set apart a homestead of realty and personalty, or either, or where the same has been applied for and set apart out of his property, as provided for by the Constitution and laws of this state, and the plaintiff in execution is seeking to proceed with the same, and there is no property except the homestead on which to levy upon the ground that his debt falls within some one of the classes for which the homestead is bound under the Constitution, it shall and may be lawful for such plaintiff, his agent, or attorney, to make affidavit before any officer authorized to administer oaths that, to the best of his knowledge and belief, the debt upon which such execution is founded is one from which the homestead is not exempt, and it shall be the duty of the officer in whose hands the execution and affidavit are placed to proceed at once to levy and sell, as though the property had never been set apart. The defendant in such execution may, if he desires to do so, deny the truth of the plaintiff's affidavit by filing with the levying officer a counter affidavit."

The question presented on the record before us may be stated in similar language to that which was used by the district judge —the correctness of whose decision in the case at bar is now for

review—in the course of his opinion In re Woodruff, 96 Fed. 317, as follows (p. 318):

"Has the bankruptcy court jurisdiction to protect or enforce against the bankrupt's exemption the rights of creditors not having a judgment or other lien, whose promissory notes or other like obligations to pay contain a written waiver of the homestead and exemption authorized and prescribed by the Constitution of the state, or are such creditors to be remitted to the state courts for such relief as may be there obtained?"

The provisions of the bankruptcy act of 1898 [30 Stat. at L. 544, c. 541 (U. S. Comp. Stat. 1901, p. 3418),] which control the consideration of the question just propounded are as follows: By clause 11 of § 2 courts of bankruptcy are vested with jurisdiction to "determine all claims of bankrupts to their exemptions." § 6 provides as follows:

"§ 6. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicil for the six months or the greater portion thereof immediately preceding the filing of the petition."

By clause 8 of § 7 the bankrupt is required to schedule all his property, and to make "a claim for such exemptions as he may be entitled to." By clause 11 of § 47 it is made the duty of the trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." By § 67 it is provided, among other things, that the property of the debtor fraudulently conveyed, etc., "shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicil, be and remain a part of the assets and estate of the bankrupt," etc. In § 70 is enumerated the property of the bankrupt which is to vest in the trustee as of the date of the adjudication in bankruptcy, "except in so far as it is to property which is exempt."

Under the bankruptcy act of 1867 [14 Stat. at L. 522, c. 176] it was held that property generally exempted by the state law from the claims of creditors was not part of the assets of the bankrupt, and did not pass to the assignee, but that such property must be pursued by those having special claims against it, in the proper state tribunals. Thus, speaking of the act of 1867, Mr. Justice Bradley (Re Bass, 3 Woods, 382, 384, Fed. Cas. No. 1,091) said:

"Not only is all property exempted by state laws, as those laws stood in 1871, expressly excepted from the operation of the conveyance to the assignee, but it is added in the section referred to, as if *ex industria*, that 'these exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee, and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title.'

"In other words, it is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not."

We think that the terms of the bankruptcy act of 1898, above set out, as clearly evidence the intention of Congress that the title to the property of a bankrupt, generally exempted by state laws, should remain in the bankrupt, and not pass to his representative in bankruptcy, as did the provisions of the act of 1867, considered In re Bass. The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act, in unambiguous language, declares shall not pass from the bankrupt, or become part of the bankruptcy assets. The two provisions of the statute must be construed together, and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property is, besides, shown by the context of the act; since, throughout its text, exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate subject to administration. The act of 1898, instead of manifesting the purpose of Congress to adopt a different rule from that which was applied, as we have seen, with reference to the act of 1867, on the contrary, exhibits the intention to perpetuate the rule, since

the provision of the statute to which we have referred in reason is consonant only with that hypothesis.

Though it be conceded that some inconvenience may arise from the construction which the text of the statute requires, the fact of such inconvenience would not justify us in disregarding both its letter and spirit. Besides, if mere arguments of inconvenience were to have weight, the fact cannot be overlooked that the contrary construction would produce a greater inconvenience. The difference, however, between the two is this: That in the latter case—that is, causing the exempt property to form a part of the bankruptcy assets—the inconvenience would be irremediable, since it would compel the administration of the exempt property as part of the estate in bankruptcy; whilst in the other, the rights of creditors having no lien, as in the case at bar, but having a remedy under the state law against the exempt property, may be protected by the court of bankruptcy, since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the State Court of such proceedings as might be necessary to make effective the rights possessed by the creditor.

As, in the case at bar, the entire property which the bankrupt owned is within the exemption of the state law, it becomes unnecessary to consider what, if any, remedy might be available in the court of bankruptcy for the benefit of general creditors, in order to prevent the creditor holding the waiver as to exempt property from taking a dividend on his whole claim from the general assets, and thereafter availing himself of the right resulting from the waiver to proceed against exempt property.

The judgment of the District Court is reversed, and the proceeding is remanded to that court with directions to overrule the exceptions to the trustee's assignment of homestead and exemption, and to withhold the discharge of the bankrupt, if he be otherwise entitled thereto, until a reasonable time has elapsed for the excepting creditor to assert, in a state tribunal, his alleged right to subject the exempt property to the satisfaction of his claim. And it is so ordered.

In re GHAZAL

174 Fed. 809, 98 C. C. A. 517

(Circuit Court of Appeals, Second Circuit. December 7, 1909)

LACOMBE, Circuit Judge. The sum in question was awarded to Ghazal by the Treasury Department on May 6, 1908, as a reward for information given by him against smugglers, which information resulted in the discovery and confiscation by the United States government of certain smuggled property. The award was made under authority of Act June 22, 1874, c. 391, § 4, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2019), which provides:

"That whenever any officer of the customs or other person shall detect and seize goods, wares, or merchandise, in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs, and charges connected therewith: provided, that for the purpose of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination. And whenever any person not an officer of the United States shall furnish to a district attorney, or to any chief, officer of the customs, original information concerning any fraud upon the customs-revenue, perpetuated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred, whether by importers or their agents, or by any officer or person employed in the customs service, such compensation may, on such recovery, be paid to such person so furnishing information as shall be just and reasonable, not exceeding in any case the sum of five thousand dollars; which compensation shall be paid, under the direction of the Secretary of the Treasury out of any money appropriated for that purpose."

It is clear that the statute makes the Secretary of the Treasury the sole judge as to whether there is an informer who is entitled to a share under this section. Until he acts the informer has merely an expectation of reward. Ramsey v. U. S., 14 Ct. Cl.

367. The trustee does not question the accuracy of this proposition.

§ 3477, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2320), provides:

"All transfers and assignments made of any claim upon the United States or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, such transfers, assignment, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

It is therefore apparent that, before the allowance to him of the $428.93, Ghazal could not have transferred the same, because any such attempted transfer would be null and void, and certainly a hoped-for award, not yet made, could not have been levied upon and sold in judicial process against him.

The relevant provision of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) is:

"§ 70. That the trustee * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all * * * property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The petition in bankruptcy was filed on April 29, 1908, but the award was not made by the Secretary of the Treasury until May 6, 1909. Under the provisions of statute above cited, therefore the trustee did not take title to this sum of $428.93.

It is contended, and the District Judge reached the conclusion, that the bankrupt was estopped from insisting that title to this sum never passed to the trustee. Before petition was filed Ghazal had made assignments to some of his creditors of certain sums,

out of moneys to be paid him by the government, all of which assignments were of course "null and void." It was on the theory that these were preferential that proceedings in involuntary bankruptcy were instituted. Ghazal at first disputed the allegation of the petition, but subsequently withdrew his answer and consented to an adjudication. The proposition contended for is that:

"When the bankrupt voluntarily receded from his position and endeavored to accept what now appears to be the benefits of the bankruptcy statute in this case, in the way of applying for a discharge from his debts, and at the same time to keep out of the estate in bankruptcy the only property about which the creditors could have attempted to maintain their position * * * the bankrupt is estopped from insisting that upon the 29th of April he could not have transferred his claim against the United States."

We do not find, in the circumstance that he has not chosen to oppose adjudication, sufficient ground for holding him to be estopped from insisting that after-acquired property shall not go to the trustee. No injury has resulted therefrom, and no one has been misled thereby. Nor can we see that the circumstance that he had no property at the time of adjudication is any reason why he should be required to give up after-acquired property, which the bankrupt act did not transfer to his trustee.

The order is reversed.[5]

PAGE v. EDMUNDS

187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. 200

(United States Supreme Court. January 5, 1903)

The appellant is a resident of Philadelphia, Pennsylvania, and has been a member of the Philadelphia Stock Exchange in good standing since the year 1880. On the 16th of November, 1899, he was adjudged a voluntary bankrupt in the District Court for the eastern district of Pennsylvania, and the cause was referred to Alfred Driver, Esq., referee in bankruptcy. In the schedules attached to his petition the appellant did not include as an asset of his estate his membership in the stock exchange. His trustee in bankruptcy caused the membership to be appraised, and peti-

5—*Cf.* Taft v. Maisely, 120 N. Y. 474; Brooks v. Ahrens, 68 Md. 212; Kingsbury v. Mattocks, 81 Me. 310; Williams v. Heard, 140 U. S. 529 (reversing Heard v. Sturgis, 146 Mass. 545).

tioned the referee for an order to sell the same. The petition was heard before the referee, who, after hearing, filed his report containing a summary as follows:

"The said Page was adjudicated a bankrupt upon his own petition on November 16, 1899. Upon his examination he stated that he is a member of the Philadelphia Stock Exchange; that he bought his seat in 1880, paying for it at that time about $5,500; that when a member wishes to dispose of his seat he hunts up somebody who wants to buy and sells it to him; that seats are always salable; that the last price paid of which he heard was $8,500; that he could sell his seat at any time to anyone who wanted to buy it; that the buyer takes it with the understanding that he will be elected a member; otherwise it is no sale; that he could sell his seat without the approval and concurrence of the other members; that he did not include the seat as an asset in his schedules because from his understanding of the matter he did not consider it an asset; that in the event of his death there would be paid to his wife $5,000 out of the gratuity fund, and that she would get said sum and the seat; that if he should sell the seat the gratuity or insurance would go with the seat.

"The trustee upon this evidence of the bankrupt caused the seat in the stock exchange to be appraised, and the appraisers have reported its value to be $8,000.

"The secretary of the stock exchange testified that the bankrupt had no unsettled contracts with or claims against him by any member of the exchange. The Philadelphia Stock Exchange is an unincorporated association. The constitution and by-laws were offered in evidence.

* * *

"The by-laws contain no provision relating to membership or transfer of membership."

As a conclusion from these facts and from the bankrupt law, the referee on March 7, 1900, "ordered that the trustee sell at public auction the seat or membership of Edward D. Page, the bankrupt, and all his right and interest therein, subject to the constitution and by-laws of the Philadelphia Stock Exchange regulating membership therein."

The appellant petitioned for a review of the referee's order by the District Court, averring error in the order in that the petitioner was advised and believed that his membership in the Philadelphia Stock Exchange was not property within the meaning

of the bankrupt act of July 1, 1898 (U. S. Comp. St. 1901, p. 3418), nor was it an asset of his estate which could be sold by his trustee in bankruptcy.

On June 19, 1900, the District Court approved the order of sale made by the referee, and directed it to be executed. The matter was then taken for review to the Circuit Court of Appeals, which court confirmed the order of the District Court. This appeal was thereupon taken.

Mr. Justice McKENNA delivered the opinion of the court:

The case presented by the record is a simple one, and does not call for elaborate discussion. Indeed, it has been virtually ruled by this court. Hyde v. Woods, 94 U. S. 525, 24 L. ed. 265; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104.

§ 70 of the bankrupt act of 1898 provides that the trustee shall be vested with:

"The title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is property which is exempt, to all * * *

"(3) Powers which he might have exercised for his own benefit. * * *

"(5) Property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process."

* * *

1. Was the seat in the stock exchange property which could have been by any means transferred, *or* which might have been levied upon and sold under judicial process? If the seat was subject to either manner of disposition, it passed to the trustee of the appellant's estate.

We think it could have been transferred within the meaning of the statute. The appellant could have sold his membership, the purchaser taking it subject to election by the exchange, and some other conditions. It had decided value. The appellant paid for it in 1880, $5,500, and he testified that the last price he had heard paid for a seat was $8,500. One or the other of these sums, or at any rate, some sum, was the value of the seat. It was property and substantial property to the extent of some amount, notwithstanding the contingencies to which it was subject. In other words, the buyer took the risk of the contingencies. And they seem to be capable of estimation. The appellant once estimated them and paid $5,500 for the seat in controversy; another buyer

estimated them and paid $8,500 for a seat. A thing having such vendible value must be regarded as property, and as it could have been transferred by some means by appellant (one of the conditions expressed in § 70) it passed to and vested in his trustee. Whether it was subject to levy and sale by judicial process we need not consider except incidentally in discussing the next contention.

* * *

Judgment affirmed.[6]

EARLE v. MAXWELL

86 S. C. 1, 67 S. E. 962

(Supreme Court of South Carolina. April 29, 1910)

WOODS, J. This appeal is from a decree overruling a demurrer to a complaint, the material allegations of which may thus be stated: On the 24th of February, 1908, the defendant F. B. Maxwell made an assignment of all his property for the benefit of his creditors to J. M. Paget. Thereafter, on the 18th day of March, 1908, Maxwell was adjudged a bankrupt by the District Court of the United States, and Martin & Earle, a partnership composed by B. F. Martin and C. B. Earle, became trustee for the bankrupt estate. This action was originally brought in the name of the partnership as trustee, but afterwards the referee in bankruptcy, with the consent of a majority of the creditors in numbers and amount, substituted C. B. Earle as trustee, and the complaint was amended to conform to the change. F. B. Maxwell, the bankrupt, is the grandson of F. C. Borstell and the son of Mrs. Alice Maxwell. By his will, Borstell made the following devise: "I will and bequeath to my daughter, Alice Maxwell, my lot on Brick Range with the storeroom, offices and all buildings connected therewith, and in view of the misfortunes of life which are incident to all persons however prudent and cautious they may be, and not from any distrust of my said daughter or her husband, I have concluded to make this a trust property, and therefore vest the fee simple of said lot and build-

6—See In re Becker, 98 Fed. 407; In re Comer & Co., 171 Fed. 261; In re Miller, 171 Fed. 263; In re Weisel, 173 Fed. 718 (all cases of liquor licenses); In re Niemann, 124 Fed. 738 (Membership in Chamber of Commerce); In re Spitzel & Co., 168 Fed. 156 (license to sell patented article). But see In re Dann, 129 Fed. 495 (inventor's rights before patent issued).

ings in D. S. Maxwell, as trustee for her, to have and to hold all and singular the said premises to him and his heirs and assigns. In trust nevertheless for the following uses and purposes: That my said daughter shall have the right to use, occupy and possess the said property, to receive the issues, rents and profits of the same, for and during the term of her natural life, and at her death, the same to be sold and the proceeds to be divided among her children, share and share alike, the share of any deceased child, or remote descendant to take the share to which the parent would be entitled if living as under the statute of distributions. And should the said trustee die or by any means a change should be necessary, my said daughter shall have the right to appoint a new trustee in writing without application to any court, who shall have all the rights conferred on the said D. S. Maxwell, and so continue to appoint new trustees as often as a contingency may arise." Mrs. Maxwell, the life beneficiary of the trust, is still living, and it is therefore uncertain whether at her death the bankrupt will take, or his children, or their children or descendants. Some years before Maxwell was adjudged a bankrupt, he undertook to assign his interest under the will to his aunt, Miss Von Borstell, now Mrs. Coleman; but this assignment is alleged to be invalid for lack of record or other notice to subsequent creditors. The trustee, believing Maxwell's interest in the trust estate to be salable, advertised it for sale, and thereupon received notice from the bankrupt that his contingent interest was not the subject of sale, and that "said sale would be contested." The allegation is made: "That by reason of such notification and claim on the part of F. B. Maxwell and on the part of others on his behalf, a cloud has been and is now being cast upon the title of the interest of the plaintiff as trustee, and that on account of the resultant probability of the bidding for the said interest being chilled by virtue of such claim and cloud upon the title as aforesaid, the plaintiff withdrew said interest from sale and now desires the question of title and salability of the said interest to be determined and declared by the court, and the cloud from said title removed." The relief asked is that the cloud on the title be removed, that the court determine and declare the salability of the interest of the bankrupt, and order the plaintiff as trustee to sell and convey it.

In the decree of the Circuit Court this statement appears: "By consent of counsel, the demurrer to the original complaint is to be considered as made to the amended complaint." The

first ground of demurrer to the original complaint was: "Because it appears from the face of the complaint that the plaintiffs have not legal capacity to sue for the following reason, to wit: §§ 44 and 45 of the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States' provide that the creditors of a bankrupt estate shall appoint one or three trustees of the estate, who shall be individuals or corporations; whereas, it appears from the complaint that Martin & Earle, a partnership composed of B. F. Martin and C. B. Earle, and engaged in the practice of law, was appointed trustee of said estate by the creditors of the bankrupt estate." Act July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438). This was the only objection made to the capacity of the plaintiff to sue, and it was removed by the amendment alleging C. B. Earle to be the sole trustee and substituting his name as plaintiff for the firm name of Martin & Earle. Therefore the point made in argument that C. B. Earle was not properly appointed trustee of the bankrupt estate was not before the Circuit Court and cannot be considered by this court.

By the demurrer the bankrupt, Maxwell, submits that the complaint does not state a cause of action: First, because his interest under the will is contingent, and is therefore not the subject of sale; and, second, because the will provides that the land shall be sold on the death of his mother and the proceeds divided, and therefore his interest is personalty, with respect to which an action to remove a cloud on title cannot be maintained. § 70a of the bankruptcy statute provides that the trustee of the estate of the bankrupt shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to "all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold by judicial process against him." The bankruptcy statute further provides for the sale of the property of the bankrupt subject to the approval of the bankrupt court.

Since under the will the trustee therein named was to sell the land and divide the proceeds of the sale after the death of the life beneficiary, the interest of F. B. Maxwell and the other children of Mrs. Maxwell is a contingent interest, not in the land, but in the proceeds of the land, which is personalty. Wood v. Reeves, 23 S. C. 382; Walker v. Killian, 62 S. C. 482, 40 S. E. 887. The court held, in Pickens v. Pickens, 13 Rich. Eq. 111,

that, while a contingent interest in land passes to the assignee of an insolvent, the sale must be postponed until the contingent interest should become vested. It has been often decided in this state that an assignment or mortgage of a contingent remainder in land is good, at least in equity. Allston v. Bank of the State, 2 Hill, Eq. 235; Rountree v. Rountree, 26 S. C. 450, 2 S. E. 474; Bank v. Garlington, 54 S. C. 413, 32 S. E. 513. Under the bankrupt statute, providing that all property which the bankrupt could by any means have transferred passes to the assignee, there can be no doubt that a contingent remainder in land would pass and would be subject to sale by the trustee.

The interest of the bankrupt in this case not being an interest in the land, but in personal property—the money to be realized from the sale of the land—it might have been doubtful, under the authority of Wood v. Reeves, *supra,* whether it could be assigned or mortgaged; for in that case the view is indicated that such possible future interest in personal property could not be mortgaged. But in the later case of Walker v. Killian, *supra,* it is expressly held that, while a paper in the form of a mortgage of such a possible future interest in personal property cannot operate as a mortgage, it is good in equity as an assignment.

In three cases in the District Court of the United States and in one case in the Circuit Court of Appeals, it has been held that such a contingent interest in either real or personal property as is here involved does not pass to the trustee in bankruptcy, because it is not property which could have been transferred by the bankrupt. In re Hoadley (D. C.) 101 Fed. 233; In re Gardner (D. C.) 106 Fed. 670; In re Twaddell (D. C.) 110 Fed. 145; In re Wetmore, 108 Fed. 520, 47 C. C. A. 477.[7] But these cases arose under the laws of New York and Pennsylvania. Under our law there can be no doubt that a bankrupt could transfer such an interest before his bankruptcy; and, that being so, the conclusion is inevitable that it passes to the trustee under a bankrupt act which provides that all "property" shall pass which the bankrupt "could by any means have transferred." It is true, as has been often said, that a contingent remainder is not technically an estate, but a mere possibility of an estate in the future; but that is very far from

7—See In re McCrea, 161 Fed. 246; Clowe v. Seavey, 208 N. Y. 496, 47 L. R. A. (N. S.) 284.

saying that it is not property. The term "property," used in the bankruptcy act, is of the broadest possible signification, embracing everything that has exchangeable value, or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition. Chas. & W. C. Ry. Co. v. Reynolds, 69 S. C. 481, 48 S. E. 476; South Bound Ry. Co. v. Burton, 67 S. C. 515, 46 S. E. 340; Delassus v. United States, 34 U. S. 117, 9 L. ed. 71; Knight v. United Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. ed. 974. It follows that under our decisions the interest of the bankrupt under the will was "property" which he could have transferred, and that, therefore, it passed to his trustee in bankruptcy to be sold by him.

* * *

It might have been more appropriate to have the right determined by application to the Federal Court having control of the bankrupt proceedings; but that point was not made by the demurrer, and is not before us.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

In re MEYER'S ESTATE

Appeal of WEISS

232 Pa. St. 89, 81 Atl. 145

(Supreme Court of Pennsylvania. May 23, 1911)

From the record it appeared that testator died December 19, 1902, leaving a will by which he gave his residuary estate to his daughter, Clara L. Beihl, and her husband, Ernest H. Beihl, "absolutely and forever, as tenants by entireties." On July 2, 1909, Ernest H. Beihl was adjudicated a bankrupt by the United States District Court, and Charles J. Weiss was appointed his trustee in bankruptcy. The trustee in bankruptcy claimed that one-half of the fund before the court should be awarded to him as the property of the bankrupt. The auditing judge disallowed the claim.

STEWART, J. The appeal is by the trustee in bankruptcy of the estate of Ernest H. Beihl from a decree of the Orphans' Court in the adjudication of the account of the trustees under the last will of C. A. Adolph Meyer, deceased, awarding the

fund before the court to Ernest H. Beihl and Clara, his wife. The appellant claims the fund in virtue of his office in bankruptcy, the appellees on the ground that the estate vested in them as husband and wife. It is not questioned that under the will through which this estate was derived husband and wife took by entireties, if indeed such estate may still be created. The contention of appellant is that this venerable and unique common-law estate has been abolished in Pennsylvania by the act of June 8, 1893 (P. L. 344), not in express terms, but by unavoidable implication. [After concluding that the estate by the entirety may still be created in Pennsylvania, the court continues:]

It is further complained of as error that the court refused to order proper security to be given for the payment to the trustee of one-half the income arising during the life of the wife from the fund for distribution. Whatever the rights of the trustee may be with respect to the fund in the event of the husband surviving his wife, it is too plain for discussion that, except as estates by entirety no longer exist, he can have no present right of enjoyment. We have just held that they do still exist. In estates of this kind husband and wife are not joint tenants or tenants in common, but both are seised of the entirety, *per tout et non per my*. As a consequence neither can dispose of any part without the consent of the other, but the whole must remain to the other. It follows that the interest of the appellant in the fund in dispute, under all our authorities defining this kind of estate, and its characteristics, is at most a contingent one. He is not presently substituted for the husband, and cannot be. His right to the use and enjoyment of any part of the fund must await the happening of the contingency of the husband surviving the wife. Until that happens, the wife's right to the enjoyment of the whole may not be disputed by any one claiming under the husband. The very enlightening discussion of the subject in the able opinion of Judge Thayer, approved and adopted by this court in McCurdy v. Canning, 64 Pa. 39, and which has consistently been followed, makes further citation of authority for the views here expressed unnecessary.

This assignment of error is likewise overruled, and the appeal is dismissed.[8]

8—See Ann. Cas. 1912 C, 1242, where the case is annotated.

GAZLAY v. WILLIAMS

210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. 687

(United States Supreme Court. May 18, 1908)

June 16, 1902, W. A. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, and Clara G. Kuhn entered into a written agreement as lessors with one J. D. Kueny, whereby, in consideration of the rents to be paid and the covenants to be performed by said lessee, his heirs and assigns, they leased to said Kueny certain premises situated on the east side of Vine street, south of Sixth street, Cincinnati, Ohio, for a period of ten years, with the privilege of ten years additional.

The lease contained the following condition:

"Provided, however, that if said lessee shall assign this lease or underlet said premises, or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had, or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess, and enjoy as in their first and former estate, and thereupon this lease and everything therein contained on the said lessors' behalf to be done and performed shall cease, determine, and be utterly void."

On the 9th of April the lessors filed a petition in the Superior Court of Cincinnati, Ohio, against J. D. Kueny for the recovery of rent due under the lease. In their petition the lessors asked that a receiver be appointed to take charge of all the property of said J. D. Kueny, including said leasehold estate, and that said leasehold premises and the unexpired term be sold, "subject, however, to all the terms, covenants, and conditions contained in the lease from said plaintiffs to said J. D. Kueny." The court thereupon appointed receivers to take charge of and manage said property, and later made an order directing said receivers to sell all of the personal property of said J. D. Kueny, including the leasehold estate, and under said order all of said property, including said leasehold estate, was sold to H. D. Brown, who took possession of the same, made extensive improvements thereon, and paid to the lessors the rent reserved

under said lease, from the time he took possession, July, 1905, to January, 1906, when proceedings were begun against him in the District Court of the United States for the Southern District of Ohio, western division, to have him adjudged a bankrupt.

Pending the adjudication, a receiver was appointed, who took charge of all of Brown's property, including said leasehold estate, and who, as such receiver, paid to said lessors the rent reserved in said lease for the month of January, 1906.

In February, 1906, the appellee herein, Fletcher R. Williams, was elected as trustee in bankruptcy of the estate and effects of said Brown, and on March 1, 1906, he filed in the bankruptcy proceeding an application for the sale of said leasehold estate, making the lessors parties thereto, and asking that they be required to set up any claim they might have upon the same. Process was issued and served upon all but one of the lessors on March 5, 1906, and on that one on March 9, 1906.

On March 6, 1906, said trustee paid to W. A. Gazlay rent for the month of February, 1906, the amount paid being the monthly sum named in the said lease. Thereupon said lessors, coming in for the purposes of the motion only, filed a motion to be dismissed from the proceedings on the ground that the court had no jurisdiction over their persons, which motion was overruled by the referee in bankruptcy. Thereupon the lessors filed an answer, "and, without intending to enter their appearance herein, but acting under protest and the direction of the court," alleged that the lease contained the condition, among others, "that if said lessee should assign the lease or underlet said leased premises or any other part thereof, or if said lessee's interest therein should be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns first had; or if said lessee or assign should fail to keep any of the other covenants of the lease by lessee to be kept, it should be lawful for said lessors, their assigns or heirs, into said premises to re-enter and the same to have again, repossess, and enjoy, as in the first and former estate; and thereupon this lease and everything therein contained on said lessor's behalf to be done and performed, should cease, determine, and be utterly void. They further say that said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the written consent of said lessors, but with their acquiescence only, and that said condition in said lease is still in full force and effect as against said Harry D.

Brown and his trustee in bankruptcy herein. That at the time of filing of the application herein, so far as they know or are informed, the said lessors had no claim in said leasehold premises adverse to said trustee in bankruptcy."

The case was submitted to the referee upon these pleadings, an agreed statement of facts, and the arguments and briefs of counsel.

The referee found that the trustee being in lawful possession of said leasehold estate, the court had jurisdiction of the persons and subject-matter of the suit; that the claim of the lessors, assuming that they had one and that it would be enforceable only after a sale, nevertheless was in the nature of a cloud upon the title of the trustee to said leasehold estate, and, as such, could be determined in this proceeding in advance of its happening; and he thereupon held that the lessors had no right, as against the trustee in bankruptcy herein, to forfeit the lease in the event of a sale by him under the court's order, and ordered the trustee to sell the same free from any claim or right on the part of the lessors to forfeit the same. To these findings and this judgment of the referee the lessors took exception and filed a petition for a review of the same in the District Court in bankruptcy. The referee certified his proceedings to the District Court, where, upon a hearing on the pleadings and facts, the findings and judgment of the referee were affirmed and the petition dismissed.

From this judgment the lessors took an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. There the cause was again submitted upon the same pleadings and facts as in the District Court, and that court affirmed the judgment of the District Court, and held that the clause in said lease providing for its forfeiture in case of a sale of the same under execution or other legal process, without the lessors' written consent thereto, had no application to a sale by the trustee in bankruptcy, and that therefore the lessors could not forfeit the lease in case the trustees herein should sell the same. 77 C. C. A. 662, 147 Fed. 678.

From this judgment the present appeal was taken.

Mr. Chief Justice FULLER delivered the opinion of the court:

The passage of the lessee's estate from Brown, the bankrupt, to Williams, the trustee, as of the date of the adjudication, was by operation of law, and not by the act of the bankrupt, nor

was it by sale. The condition imposed forfeiture if the lessee assigned the lease or the lessee's interest should be sold under execution or other legal process without lessors' written consent.

A sale by the trustee for the benefit of Brown's creditors was not forbidden by the condition and would not be in breach thereof. It would not be a voluntary assignment by the lessee, nor a sale of the lessee's interest, but of the trustee's interest, held under the bankruptcy proceedings, for the benefit of creditors. Jones, in his work on Landlord and Tenant, lays it down (§ 466) that "an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law." The covenant here is not of that character.

The doctrine of Dumpor's Case, 4 Coke, 119, 1 Smith, Lead. Cas. *85, is that a condition not to alien without license is determined by the first license granted; and District Judge Thompson expressed the opinion that it was applicable here, and that the sale to Brown, under the order of the Superior Court of Cincinnati, entered on the petition of these lessors for the recovery of rent, set the leasehold free from the forfeiture clauses, especially as that court did not direct that the sale be subject to the terms, covenants, and conditions of the lease, as prayed for in the petition. Moreover, the lessors, in their answer in these proceedings, stated that "said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the written consent of said lessors, but with their acquiescence only; and that the said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein."

In respect of the lessors, Brown may be treated, then, as if he were the original lessee; and the sale by his assignee in bankruptcy, under order of the bankruptcy court, was not a breach of the condition in question. The language of Bayley, J., in Doe ex dem. Goodbehere v. Bevan, 3 Maule & S. 353, cited by the Court of Appeals, is applicable.

The premises in question in this case, being a public house, were demised by Goodbehere to one Shaw for a term of years, and Shaw covenanted that he, his executors, etc., should not nor would, during the term, assign the indenture, or his or their interest therein, or assign, set, or underlet the messuage and

premises, or any part thereof, to any person or persons whatsoever, without the consent in writing of the lessor, his executors, etc. Proviso, that in case Shaw, his executors, etc., should part with his or their interest in the premises, or any part thereof, contrary to his covenant, that the lessor might re-enter. Afterwards Shaw deposited this lease with Whitbread & Company as a security for the repayment of money borrowed of them; and, becoming bankrupt, and his estate and effects being assigned by the commissioners to his assignees, the lease was, upon the petition of Whitbread & Company, directed by the Lord Chancellor to be sold in discharge of their debt, and was, accordingly, sold to the defendant, and, without the consent of Goodbehere, assigned to the defendant by the assignees, and he entered, etc. The trial judge ruled that this was not a breach of the proviso not to assign without consent, etc., inasmuch as the covenant did not extend to Shaw's assignees, they being assignees in law; wherefore he directed a nonsuit. The rule to set aside the nonsuit was discharged on argument before Lord Ellenborough, Ch. J.; LeBlanc, J.; Bayley, J., and Dampier, J. (delivering concurring opinions); and Bayley, J., said:

"It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and if it be not, what act has the lessee done to avoid it? All that has followed upon his bankruptcy is not by his act, but by the operation of law, transferring his property to his assignees. Then shall the assignees have capacity to take it, and yet not to dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their hands, to the prejudice of the creditors, for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

Decree affirmed.[9]

BURLINGHAM v. CROUSE

228 U. S. 459, 57 L. ed. 920, 33 Sup. Ct. 564

(United States Supreme Court. April 28, 1913)

Mr. Justice DAY delivered the opinion of the court:

The action was brought in the United States District Court for the Southern District of New York by the trustees of the firm

9—See In re Montello Brick Works, 163 Fed. 624; Plaut v. Gorham Mfg. Co., 174 Fed. 872; In re Frazin, 183 Fed. 28; Wilson v. Wallani, 5 Ex. Div. 155 (reviewing the English statutes).

of T. A. McIntyre & Company, and of the individual members of that firm, bankrupts, against Charles M. Crouse and the Equitable Life Assurance Society of the United States, to recover the sum of $90,698.32, the net proceeds of certain policies of insurance issued by the Equitable Life Assurance Society upon the life of Thomas A. McIntyre, one of the bankrupts, deceased. The proceeds of the policies were paid into court by the society. The judgment of the District Court in favor of Crouse was affirmed by the Circuit Court of Appeals (104 C. C. A. 227, 181 Fed. 479), and the case has been appealed to this court.

It appears that on the 10th of April, 1902, Thomas A. McIntyre obtained two policies of life insurance in the Equitable Society. They were known as "guaranteed cash-value, limited payment, life policies," each providing that upon the death of the insured the company would pay to his executors, administrators, or assigns the sum of $100,000 in fifty annual instalments, or the sum of $53,000 in cash, a total of $106,000 for the two policies. On April 14, 1906, the policies were assigned absolutely to the firm of T. A. McIntyre & Company, and on April 24, 1907, they were by that firm assigned to the Equitable Society as collateral security for a loan of $15,370. On February 25, 1908, two months prior to the filing of the petition in bankruptcy, the policies were assigned by McIntyre & Company to the defendant, Charles M. Crouse, subject, however, to the prior assignment to the Equitable Society. A petition in involuntary bankruptcy was filed against McIntyre & Company and its individual members on April 25, 1908, and on May 9, 1908, the defendant Crouse paid the premiums on the policies, in the sum of $6,078.38. McIntyre & Company and the individual members thereof were adjudged involuntary bankrupts on May 21, 1908, and the trustees were elected on the 24th of July, 1908. On the 29th of July, 1908, Thomas A. McIntyre died, and the policies became payable.

It appears that the policies had a cash surrender value, which, at the time when the trustees qualified, was $15,370, or the amount of the loan of the Equitable Society upon the policies. It is therefore apparent that on the day when the petition was filed, as well as the day of the adjudication in bankruptcy, the cash surrender value would not have exceeded the loan and lien of the society upon the policies. The Circuit Court of Appeals for the Second Circuit held that, under the circumstances, the

policies did not pass to the trustees as assets, and therefore the action which had been begun to set aside the transfer to Crouse, as a preference within the bankruptcy act, could not be maintained.

The correctness of this decision depends primarily upon the construction of § 70*a* of the bankruptcy act, which reads:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

The part of the section particularly to be considered is subdiv. 5 and its proviso. Subdivision 5 undertakes to vest in the trustee property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon or sold under judicial process against him. Then follows the proviso with reference to insurance policies which have a cash surrender value, permitting a bankrupt, when the cash surrender value has been ascertained and stated, to pay or secure such sum to the trustee, and to continue to hold, own, and carry the policies free from the claims of creditors; otherwise the policies to pass to the trustee as assets.

Two constructions have been given this section, and the question, as presented in this case, has not been the subject of direct determination in this court. The one favors the view that only policies having a cash surrender value are intended to pass to the trustee for the benefit of creditors.[10] The other, conceding that the proviso deals with this class of policies, maintains that policies of life insurance which have no surrender value pass to the trustee under the language of § 70*a* immediately preceding the proviso, which reads: "Property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."[11]

To determine the congressional intent in this respect requires a brief consideration of the nature of the rights dealt with. Life insurance may be given in a contract providing simply for payment of premiums on a calculated basis which accumulates no surplus for the holder. Such insurance has no surrender value. Policies, whether payable at the end of a term of years or at death, may be issued upon a basis of calculation which accumulates a net reserve in favor of the policy holder, and which forms a consequent basis for the surrender of the policy by the insured, with advantage to the company upon the payment of a part of this accumulated reserve. This feature of surrender value was discussed by Judge Brown of the Southern District of New York, In re McKinney, 15 Fed. 535, 537:

"The first of these elements, the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy,—an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured, deposited with the company in advance, to make up the deficiency

10—In re Buelow, 98 Fed. 86; In re Josephson, 121 Fed. 142; Gould v. New York L. Ins. Co., 132 Fed. 927; Morris v. Dodd, 110 Ga. 606, 50 L. R. A. 33, 78 Am. St. Rep. 129, 36 S. E. 83.

11—In re Becker, 106 Fed. 54; In re Slingluff, 106 Fed. 154; In re Welling, 51 C. C. A. 151, 113 Fed. 189; In re Coleman, 69 C. C. A. 496, 136 Fed. 818; In re Hettling, 99 C. C. A. 87, 175 Fed. 65; In re Orear, 30 L. R. A. (N. S.) 990, 102 C. C. A. 78, 178 Fed. 632.

in later premiums to cover the annual cost of insurance, instead of being retained by the assured, and paid by him to the company in the shape of greatly-increased premiums, when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force, the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund.

"Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now usually made. * * *"

This case has been cited with approval in this court. Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; Hiscock v. Mertens, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488.

Under the bankruptcy act of 1867 [14 Stat. at L. 522, c. 176, § 14] no special provision was made for insurance policies. The section providing for the passing of the assets of the bankrupt to the trustee contained the broad language of "all the estate, real and personal." Under this statute it was held In re McKinney, *supra*, that the insurance upon the life of the bankrupt vested in the bankrupt estate only to the extent of its cash surrender value at the time of the filing of the petition.

In Holden v. Stratton, *supra*, this court held that the law of the state of Washington, exempting the proceeds of life insurance policies, was applicable, and under the bankruptcy act of 1898, § 6, the bankrupt might retain such policies. The Circuit Court of Appeals for the Ninth Circuit, from which Holden v. Stratton came by *certiorari* to this court, had held that § 70*a* was not controlled by the exemptions provided in § 6 of the bankruptcy act, and had adhered to its former decision In re Scheld, 52 L. R. A. 188, 44 C. C. A. 233, 104 Fed. 870, in which § 70*a* had been construed to pass insurance policies having a cash surrender value to the trustee, unless the bankrupt paid or secured the surrender value, as pointed out in the section. While this court held that the exemption under the state law

applied under the bankruptcy act to the policy in question, coming to deal with the construction of § 70*a*, this court said (198 U. S., p. 213):

"As § 70*a* deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve."

The section came again before this court in Hiscock v. Mertens, *supra*, and it was held that the insured was entitled to retain the policies upon the payment to the trustee of a sum equivalent to the amount the company was willing to pay according to its custom, although there was no stipulation in the policies as to a cash surrender value, and upon this subject the court said (p. 212):

"What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies? In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to 'continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings.'" [12]

And in that case it appeared that this sum was less than $6,000, whereas in a short time, some six months later, the maturity of one of the policies would give it a value of over $11,000. But this court held that this circumstance made no difference

12—See In re Coleman, 136 Fed. 818, where the policy had a loan value only.

in the right of the insured to pay the surrender value and hold the policy.

True it is that life insurance policies are a species of property and might be held to pass under the general terms of subdiv. 5, § 70*a*, but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute. It is also true that a proviso may sometimes mean simply additional legislation, and not be intended to have the usual and primary office of a proviso, which is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms.

This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value. Originally life insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been much varied in form since, and policies payable in a period of years, so as to become investments and means of money saving, are in common use. But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay, and which brings the policy within the terms of the proviso (Hiscock v. Martens, *supra*), and makes its present value available to the bankrupt estate. While life insurance is property, it is peculiar property. Legislatures of some of the states have provided that policies of insurance shall be exempt from liability for debt, and in many states provision is made for the protection from such liability of policies in favor of those dependent upon the insured. See Holden v. Stratton, *supra*.

Congress undoubtedly had the nature of insurance contracts in mind in passing § 70*a* with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that

when that sum was realized to the estate, the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the bankruptcy act to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance.

It should be observed, in this connection, that in the present case the company had advanced upon the policies their full surrender value, as stipulated in the policies, and that the only interest that could have passed to the trustees would have been the speculative right to the net proceeds of the policies, contingent upon the death of the bankrupt, and possibly dependent upon the payment of large annual premiums for thirteen years.

It is urged, however, that under § 70*a*, the cash surrender value was to be paid by the *bankrupt* when ascertained, and the policies kept alive for *his* benefit; and as these policies had been assigned by the beneficiary to McIntyre & Company, not as collateral, but absolutely, they would not come within the terms of the proviso, and therefore the proceeds of the policies vested in the bankrupt estate; but we find nothing in the act by which the right of the assignee of a policy to the benefits which would have accrued to the bankrupt is limited. As we have construed the statute, its purpose was to vest the surrender value in the trustee for the benefit of the creditors, and not otherwise to limit the bankrupt in dealing with his policy.

* * *

It results that the judgment of the Circuit Court of Appeals must be affirmed.[13]

13—See Foxhever v. Order of Red Cross, 2 O. C. C. (N. S.) 394; In re Pfaffinger, 161 Fed. 526; In re Whelpley, 169 Fed. 1019; In re Hettling, 175 Fed. 65; In re Orear, 178 Fed. 632. See also Hewlett v. Home for Incurables, 74 Md. 350.

EVERETT v. JUDSON

228 U. S. 474, 57 L. ed. 927, 33 Sup. Ct. 568

(United States Supreme Court. April 28, 1913)

Mr. Justice DAY delivered the opinion of the court:

This case involves the title to the proceeds of certain insurance policies upon the life of Alfred M. Judson, bankrupt, deceased, collected by the trustee in bankruptcy. The executor of Judson's estate brought suit against the trustee in the United States District Court for the Southern District of New York, asserting title to such funds. The District Court ordered that the proceeds of the policies, less their cash surrender value, be paid to the executor (188 Fed. 702); the Circuit Court of Appeals for the second circuit, upon petition to revise, affirmed that order (113 C. C. A. 158, 192 Fed. 834), and the case comes here on *certiorari*.

A petition in involuntary bankruptcy was filed against the firm of Judson & Judson and its members, Alfred M. Judson being one, on December 17, 1910, and on December 23, 1910, Judson entered a notice of his appearance in the proceedings. On January 9, 1911, the firm and its members were adjudged bankrupts, and on February 9, 1911, Everett qualified as trustee. Judson owned certain life insurance policies at the time of the institution of the bankrupt proceedings, and thereafter and until his death, payable to his executors, administrators, or assigns. So far as this case is concerned, at the time of the filing of the petition in bankruptcy, these policies, with cash surrender values and subject to loans, were as follows: One policy for $5,000, having a cash surrender value of $2,291.49, and subject to a loan of $2,238; another for $1,000, having a cash surrender value of $332.31, and subject to a loan of $322; and another for $10,000, having a cash surrender value of $5,030, and subject to a loan of $5,240. It therefore appears that the cash surrender value of the policies on December 17, 1910, was $63.80.

On January 4, 1911, Judson committed suicide. Notice was served on the trustee that the executor claimed the right, under § 70*a* of the bankruptcy act, to pay to the trustee the cash surrender value of the policies when ascertained, but the trustee denied such right and also the right of the executor to the balance of the proceeds of the policies. Under agreement, the insurance companies paid to the trustee $8,675.14 upon the

policies. The executor asserted title to the difference between the sum realized on the policies and the cash surrender value; namely, $8,611.34. The District Court, upon the authority of Burlingham v. Crouse, 104 C. C. A. 227, 181 Fed. 479, held that the proceeds of the policies, over and above the cash surrender value as of the date of the filing of the petition, passed to the executor. The Circuit Court of Appeals affirmed the order of the District Court, holding that the time when the interest of the bankrupt estate in the policies passed to the trustee was the date of the filing of the petition, and further, also upon the authority of Burlingham v. Crouse, *supra*, that the interest of the trustee in the policies extended only to their cash surrender value.

The present case was argued at the same time as the case of Burlingham v. Crouse [228 U. S. 459, 57 L. ed. —, 33 Sup. Ct. Rep. 564], and in so far as it is like that case the principles therein laid down are controlling. The present case has, however, a feature not directly involved in the case of Burlingham v. Crouse, because Judson, the insured, committed suicide before the adjudication in bankruptcy, although after the filing of the petition, and it is the contention of the petitioner that the bankruptcy act vested the title to the property in the trustee as of the time of the adjudication, and that the death of the bankrupt between the filing of the petition and the date of the adjudication made the proceeds of the policies assets in the hands of the trustee.

While it is true that § 70*a* provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition. This subject was considered in Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96, wherein it was held that, pending the bankrupt proceedings, and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. § 70*a* vests all the property in the trustee, which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. The bankrupt's discharge is

from all provable debts and claims which existed on the day on which the petition for adjudication was filed. Zavelo v. Reeves, 227 U. S. 625, 630, 631, 57 L. ed. 676, 33 Sup. Ct. Rep. 365. The schedule that the bankrupt is required to file, showing the location and value of his property, must be filed with his petition.

We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. And it is as of that date that the surrender value of the insurance policies mentioned in § 70*a* should be ascertained. The subsequent suicide of the bankrupt before the adjudication was an unlooked-for circumstance which does not change the result in the light of the construction which we give the statute.

It follows that the judgment should be affirmed.

GIBSON et al. v. CARRUTHERS

8 Meeson & Welsby, 321

(Court of Exchequer. May 3, 1841)

ROLFE, B. The plaintiffs in this cause are the assignees of Thomas Harris, a bankrupt.

The declaration states, that Harris, before his bankruptcy, agreed to buy from the defendant about 2,000 quarters of linseed, free on board at Odessa, at 30s. 10d. per quarter, the shipment to be made on board the buyer's vessel on arrival at Odessa, which vessel was to be forthwith chartered for thence, and the amount of the invoice was to be paid on handing over the same and the bills of lading to the buyers in London.

The declaration then states mutual promises by Harris and the defendant, according to the terms of that agreement, and goes on to aver that Harris, in part performance, &c., dispatched a vessel to Odessa, which arrived there in a reasonable time, and was ready to receive the linseed on board; that before its arrival Harris had become bankrupt; but the master of the ship was ready and offered to receive the linseed on board, and to give bills of lading pursuant to the agreement; that the defendant refused to deliver the linseed on board, or any part thereof, by reason whereof the plaintiffs, as assignees of Harris, have suffered damage, etc. The declaration then goes on to state that

the plaintiffs afterwards, within a reasonable time after the arrival of the vessel at Odessa, gave notice to the defendant of their being ready and willing to pay for the linseed on delivery in London according to the agreement; yet the defendant refused to deliver, etc.

To this declaration the defendant has pleaded, that the plaintiffs did not, within a reasonable time after the arrival of the vessel at Odessa, give notice to the defendant of their intention to adopt the contract.

The plaintiffs have demurred to this plea, and have assigned several causes of demurrer, all founded on the principle that the plea attempts to raise an immaterial issue.

On the argument of this case in last Michaelmas Term it was contended on the part of the defendant, first, that the declaration does not state a case which gives a right of action to the assignees; and secondly, that if it does, then the plea discloses a good defense.

I am of opinion that neither of these propositions can be supported.

As to the first point, the validity of the declaration: it is clear that assignees of a bankrupt are entitled to the benefit of all contracts entered into by the bankrupt, and which are in fieri at the time of the bankruptcy. They may elect to adopt or reject such contracts, according as they are likely to be beneficial or onerous to the estate. *In no case can the party who contracted* with the bankrupt set up the bankruptcy against the assignees, as a reason for not doing what he has agreed to do. Where, indeed, the payment of money or performance of any other duty by the bankrupt forms a condition precedent to the doing of the act which the contracting party has agreed to do, there, unless the money is paid or duty performed, either by the bankrupt or his assignees, it is plain, on principles altogether independent of any questions arising from bankruptcy or insolvency, that no obligation exists on the other party to perform his part of the engagement. But no objection of this sort can be set up, except in the case of a mere contract for the sale and delivery of goods, until the time has arrived when the party seeking the benefit of the contract fails to do something which according to its provisions he ought to do. Until default, no such objection arises, even where the whole matter rests in fieri; but much less can such a course be pursued where, as in the present case, the declaration shows that a part, and probably

no inconsiderable part, of the contract has actually been already performed by the plaintiffs, or rather by the bankrupt whom the plaintiffs represent. For it will be observed, that in this case the first act to be performed under the contract was the sending of a ship to Odessa. This was actually done at the cost and risk of the bankrupt. If the argument of the defendant be well founded, the bankrupt or his estate must sustain the loss occasioned by his having thus far fulfilled his part of the contract.

It was endeavored to liken this to a case of stoppage *in transitu,* to which it was supposed to bear a strong analogy. But it does not appear to me that any such analogy exists. Where a vendor of goods has put them into the hands of a carrier, in order to their being by him forwarded and delivered to the vendee, then, if the vendee before actual delivery to him becomes insolvent, the vendor has a right to resume the possession with which he had previously parted. It may be conceded, that the same circumstances which would justify a seller in stopping the goods *in transitu,* will also warrant his retaining them before the *transitus* has commenced, where nothing remains to be done but to deliver the goods to the purchaser. But here the proposed transit of the linseed from Odessa to London was not, as it seems to me, a *transitus* within the meaning of the doctrine relative to stoppage *in transitu.* I consider it to be of the very essence of that doctrine, that during the *transitus* the goods should be in the custody of some *third person,* intermediate between the seller who has parted with, and the buyer who has not yet acquired, *actual* possession. In this case the linseed was to be brought to London, not in the ordinary course of delivery by a seller to a buyer, but under the terms of a special contract, which reserved to the defendant, the seller, the exclusive control over it by means of the bills of lading. It was one of the terms of the contract, that the defendant should in a certain stipulated mode cause the linseed to be transported to London, in order that it might there be by him delivered at a price agreed upon to the bankrupt. This the defendant was bound to do, in the same way as if he had agreed to do any other act; as for instance, to build a ship, to manufacture goods, or the like; and he had no right to anticipate that when he had performed his part of the contract, the bankrupt, with whom he had contracted, would not by himself or his assignees perform what he had agreed to do. If the contract was beneficial to the bankrupt, the assignees would of course adopt it; if it was

onerous, then the defendant would have to look to the bankrupt himself, the sole party with whom he contracted, and whose liability would continue notwithstanding the bankruptcy, as was established by the case of Boorman v. Nash, 9 B. & C. 145. On these grounds I think the declaration discloses a state of facts which gives the plaintiffs a right of action.

Supposing this to be so, then the only other question is, whether the plea states matter which destroys the right of action appearing on the declaration: I think it does not. All beneficial interests in the bankrupt are by operation of law transferred to the assignees, including such a right of action as exists in the present case. The assignees have the right of adopting or repudiating the contracts of the bankrupt, according as they may think them likely to prove beneficial or the contrary. The proposition implied and asserted by this plea is, that the assignees are not entitled to the benefit of the bankrupt's contracts, unless, within a reasonable time, they give notice of their intention to adopt them. But for this proposition I find no warrant either in the statutes or the decided cases. All that the assignees are bound to do, is, to fulfill the bankrupt's part of the engagement when the proper time arrives. If they expressly waive the contract, or without any express waiver, if at the proper time they omit to do what, by the terms of the contract, they are bound to do, in the first case they certainly will, and in the second they probably may, absolve the other party from all obligation towards the assignees. But in such a case the proper course for the defendants would be to plead, not that the assignees had not given notice of adopting the contract, but that they had repudiated it, of which the express waiver certainly would, and the implied waiver, by omitting to do what they ought to do, might, under the circumstances, afford sufficient evidence. In this case it is not alleged by the plea that there was any express waiver, or any implied waiver, by omitting to perform any part of the contract, which, as representing the bankrupt, they were bound to perform; and on the contrary, it is clear, from the pleadings, that they were always ready to do all which the bankrupt would have been bound to do; and I therefore think that nothing is stated in the plea defeating the plaintiffs' right of action as disclosed in the declaration, and consequently that judgment ought to be for the plaintiffs.[14]

14—The opinions of GURNEY, B., PARKE, B., and Lord ABINGER, C. B., are omitted.

But see In re Chalmers, L. R. 8 Ch. App. 289. See also In re Glick, 104 Fed. 967; In re Stern, 116 Fed.

BECKHAM v. DRAKE

2 H. L. Cas. 579

(House of Lords. 1847, 1849)

This was a writ of error upon a judgment of the Court of Exchequer Chamber reversing a judgment of the Court of Exchequer of Pleas, in an action on promises. Beckham had entered the employment of the defendants under a contract for seven years' service at a stated compensation. It was agreed that in case either of the parties should not well and truly observe, etc., the covenants, etc., the party in default should pay to the other five hundred pounds as "specific damages." After being dismissed Beckham was declared bankrupt. Later he brought this action. The defendants pleaded, first, "non-assumpsit;" and secondly, that Beckham became bankrupt after the accruing of the cause of action and before the commencement of the suit. Beckham joined issue upon the plea of "non-assumpsit," and demurred to the plea of bankruptcy. The issue in fact was tried and a verdict given for the plaintiff, damages £500 (9 M. & W. 79).

The demurrer was argued before the judges of the Court of Exchequer, who gave judgment for the plaintiff upon the demurrer (8 M. & W. 846). The defendants brought a writ of error in the Exchequer Chamber, and, after argument, the judgment of the Court of Exchequer was reversed (11 M. & W. 315).[15]

BARON PARKE. The question proposed by your Lordships is, whether the plaintiff or the defendant in error is entitled to judgment.

It was my duty to deliver the judgment of the Court of Exchequer, consisting of my brothers Alderson, Rolfe, my late brother Gurney, and myself, when this case was decided by that court (8 M. & W. 846), and to assign the reasons which induced me to form the opinion then expressed. The discussion of the case on the writ of error at your Lordships' Bar, and the subsequent consideration of it, and of the judgment of the Exchequer Chamber, have induced me to think that the reasons so assigned by me are insufficient.

604; In re Nat. Wire Corp., 166 Fed. 631.

15—This statement of facts is substituted for that in the report.

One of the causes that has led me to doubt the propriety of that decision is, that a penalty is given for the non-performance of this agreement: for it is clear, that, according to the cases of Kemble v. Farren (31 R. R. 366 [6 Bing. 141]) and others, though the sum of £500 is said to be for "specific damages," it is to be construed as a penalty; and whether that penalty would vest in the assignees under the circumstances of this case, is a question which I propose afterwards to consider. But I assume for the present, that the case is in the same position as if there was no penalty; on which footing it has been argued at your Lordships' Bar and in the court below. I would premise that it is not necessary to say anything upon a question discussed in the court below, whether all the defendants are liable upon a contract, though in writing, made by one in reality on his own behalf, and as agent for the others. There is now no doubt upon this point; both the courts below concur in this respect; nor was it disputed in the argument here. The principal question in the case on the above mentioned assumption is, whether the right of action for a breach before bankruptcy of such a contract as this, for the personal services of the bankrupt, passes to the assignees.

The general question turns on the 6 Geo. IV, c. 16, § 63, which must be construed with the aid of the twelfth section, and with that of former decisions upon the repealed statutes relative to bankrupts. By that section, "all the present and future personal estate of the bankrupt, wheresoever found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed to, or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same shall be found or known, are assigned, and such assignment is to vest the property, right, and interest in such debts, as fully as if the assurance whereby they are secured had been made to the assignees, and they have the same remedy to recover as the bankrupt would have had."

A former section (12) enabled the Lord Chancellor to appoint commissioners, with full power and authority to make such order and direction as to the lands, moneys, fees, offices, annuities, goods, chattels, wares, merchandises and debts, wheresoever they may be found or known. The two sections are to be read together.

It is not disputed that the rights of the assignee under the

statute law are not identical with, nor are they so extensive as those of an executor, who stands in the place of his testator, and represents him as to all his personal contracts, and is by law his assignee (Wentw. Off. Exor. 100), and therefore may maintain any action in his right which he himself might. (Bac. Abr. Exors. N.) That must be understood to mean any action on a contract, for an executor never could sue for wrongs to his testator; "*actio personalis moritur cum persona.*" And with respect to contracts, some exceptions have been introduced by modern decisions: Chamberlain v. Williamson (15 R. R. 295 [2 M. & S. 408]), Kingdon v. Nottle (14 R. R. 462 [1 M. & S. 355]) and 16 R. R. 379 [4 M. & S. 53]), as explained by Lord Abinger in the case of Raymond v. Fitch (41 R. R. 797 [2 Cr. M. & R. 588, 599]), and the executor cannot sue upon contracts the breach of which is a mere personal wrong. The executor takes all the other personal rights of a testator, as a consequence of his representative character, whether they are available for the payment of debts or not, for his liability to pay debts is the consequence, not the object, of the appointment. The assignee is created by statute, for the purpose of recovering and receiving the estate, and paying the debts of the bankrupt, and takes only what the statute gives for that purpose. What then does it give? It clearly gives in the section above mentioned, not merely all personal chattels, securities for money, and debts properly so called, but all unexecuted contracts which the assignee could perform, the performance of which would be beneficial to the bankrupt's estate. These are "personal estate." The assignee takes, in the language of Lord Tenterden in Wright v. Fairfield (2 B. & Ad. 727), all "the beneficial matters" belonging to the bankrupt; or, as Mr. Justice Buller said, "anything belonging to the bankrupt that can be turned to profit;" Smith v. Coffin (3 R. R. 435 [2 H. Bl. 444]).

This contract, if unexecuted, would clearly not have passed to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed. The words "personal estate" clearly comprise all chattels, chattel interests, and all the subjects mentioned in the twelfth section; and they also comprise some rights of action which are not properly debts, and would not pass under the word "debts," but do pass under the description of "personal estate."

For instance, some actions for torts do pass. Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this.

On the other hand, rights of action for injuries to the person, or reputation, or the possession of real estate, do not pass. Actions of assault, for example, and for defamation, actions on the case for misfeasance, doing damage to the person, for trespass *quare clausum fregit* (Rogers v. Spence, 67 R. R. 736 [13 M. & W. 571]; affirmed in this house, 69 R. R. 169 [12 Cl. & Fin. 700]), actions for criminal conversation with the wife, for seduction of the servant or daughter of the bankrupt, are not transferred to the assignee, even though some of these causes of action may be followed by a consequential diminution of the personal estate, as where by reason of a personal injury a man has been put to expense, or has been prevented from earning wages or subsistence; or where by the seduction the plaintiff has been put to expense: Howard v. Crowther (58 R. R. 823 [8 M. & W. 601]). But with respect to contracts; rights of action for the breach of such as directly affect the personal estate, whereby the assignee is prevented from receiving part of it, or its value is diminished, are certainly transferred; as for example, rights of action on a beneficial contract, whereby one engaged to sell and deliver goods to the bankrupt, and which, if performed, would have put him in the possession of the goods, or a contract with another to carry or take care of the goods of the bankrupt which are lost, or injured, and thereby diminished in value.

On the other hand, actions for the breach of contracts personal to the bankrupt, unaccompanied by an injury to the personal estate, as a contract to carry him in safety, to cure his person of a wound or disease, or a contract with a person, who subsequently becomes bankrupt, to marry, are certainly not assigned. This is conceded; but it is questioned on the part of the defendant in error, I think without sufficient ground, whether the assignee would not be entitled to sue in any of these cases, if the personal estate was consequently damaged, as where the bankrupt was put to expense by the breach of contract, or lost the power of earning money.

What then is the proper construction of this section of the

act, according to its words and the several cases decided upon it? The proper and reasonable construction appears to me to be, that the statute transfers not all rights of action which would pass to executors (for rights incapable of being converted into money, such as the next presentation to a void benefice, pass to them), but all such as would be assets in their hands for the payment of debts, and no others—all which could be turned to profit, for such rights of action are personal estate. Of such the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee requires that he should have them also. But rights of action for torts which would die with the testator, according to the rule, "*actio personalis moritur cum persona,*" and all actions of contract affecting the person only, would not pass. Of such the executor is not assignee in law; and whatever may be the reason of the law which prohibits him from being so, seems equally to apply to a bankrupt's assignee.

According to this rule, the description of contracts upon which the right of action is transferred, would include, but would not be restricted to, such as directly affect some chattel or subject of property which would pass to the assignees, or to such as would, if they had been performed, have produced such property, which alone, it was argued at your Lordships' Bar, would be transferred by the statute; and this was in accordance with the view I took in the court below. I think, upon subsequent reflection, that this is too narrow a construction of the statute, and that it applies to all contracts for the breach of which an executor could sue, which could be turned to profit for the payment of creditors. And if this be the true construction of the statute, if all the damages for this breach of contract could have been recovered by an executor, the assignee could recover them, and the plea would be a good plea in bar.

But if part was recoverable for the personal inconvenience of the bankrupt, a different question presents itself. I think this contract cannot be said not to relate in any part to the person of the bankrupt, but that his personal inconvenience and trouble in looking out for a new employment would be part of the damages recovered. If so, that part could not be transferred to the assignees, and ought not to be lost; the right to those damages, which would be lost in the case of a testator's death altogether, continues in the bankrupt. It is upon this point that the case appears to me to turn. Who then are to sue for the breach of contract where part belongs to the assignee, part to

the bankrupt? Who would have to sue if the contract was to cure the bankrupt of a disease, and give him a sum of money, and there had been a breach of both parts, which appears to me to be a similar question? It is extremely difficult to say in whom the right of action would be.

Either the right of action on the contract must be divided, and each sue, or the right of action altogether must remain in the bankrupt, or altogether be transferred to the assignees, or both must join, the contract being entire, to sue for the damages. In the first two cases the plea would be good, in the last two bad; for in the first it would be no answer to the entire cause of action; in the second, it would be no answer to any part. I should feel considerable difficulty in deciding the question, but this case does not depend upon it, for I have now to consider what the effect of the penalty is.

This subject was not discussed at your Lordships' Bar, and was little adverted to in the court below.

At common law the penalty would have been forfeited, and, being a sum certain, would have passed to the assignees; for, at the time of the bankruptcy it would have been uncertain whether the defendant would ever have filed a bill for relief, supposing he could have done so; and a sum certain, defeasible on an uncertain event, would have been, until defeated, personal estate, and would certainly vest in the assignees. But the question is, whether the statute 8 & 9 Will. III, c. 11, has not made an alteration. That statute in effect makes the bond a security only for the damages really sustained. If all the damages would be recoverable by the assignees, the penalty would pass; if none, the penalty could not be levied, and therefore could not be available for the payment of creditors, and probably would not pass to the assignees. If part of the damages could be recovered by the assignees, and part not, the question is different. The penalty would then be a security for damages partly belonging to the assignees, partly to the bankrupt. It would be like the case of a bond to the bankrupt conditioned not to assault him, and to pay him a sum of money, forfeited in both respects before the bankruptcy; and I have had some difficulty in saying whether the right of action on such a bond would or would not pass to the assignees.

But it seems to me to be clear that the penalty, which is an entire thing, could not be divided, so that each could sue for a part; and it could not be predicated what part would pass to

each. It follows, therefore, that either the right to the entire penalty must remain in the bankrupt, or that either both the bankrupt and the assignee must join, as being both interested, or that the right to sue goes to the assignees, in order to secure such part of the damages as is the personal estate of the bankrupt vested in them. I cannot help thinking that both ought to sue, as they would do if the bankrupt before his bankruptcy had assigned a part of an entire debt as a security to a creditor, and consequently was a trustee for him for that part. But, at all events, I do not think the right to the penalty would remain in the bankrupt; and therefore the plea is a good plea, as it shows that the bankrupt could not sue alone.

Therefore, in either view of the case, I now think the judgment of the Court of Exchequer should be reversed, and the judgment of the Exchequer Chamber affirmed. If the whole of the damages are part of the personal estate which passed to the assignees, the plaintiff was barred; if some were, and some were not, still for the reasons before-mentioned the plea appears to me to be good, and my opinion which I expressed in the court below was wrong.

My opinion now, therefore, is, that the plea of the plaintiff's bankruptcy is a good bar, and that the judgment of the Exchequer Chamber ought to be affirmed.[16]

SIBLEY v. NASON et al.

196 Mass. 125, 81 N. E. 887

(Supreme Judicial Court of Massachusetts. June 20, 1907)

On July 12, 1902, plaintiff was [injured through the alleged negligence of defendant. It] appeared that plaintiff was adjudged a bankrupt in March, 1904, after having brought suit for his injuries on August 9, 1902, whereupon defendant requested the court to rule, *inter alia*, (4) that plaintiff, having been adjudged a bankrupt subsequent to the commencement of the action, could not prosecute the same, and was therefore not entitled to recover; (7) that, if plaintiff was entitled to recover, he could not recover for debts incurred for physicians' services, which had never been paid, but had been proved against his estate in bankruptcy or included in his bankruptcy schedules; (8) that, if

16—See Streeter v. Sumner, 31 N. H. 542.

plaintiff was entitled to recover, the market value in the kind of business in which he was engaged, if any, of his services from the time of the accident to the time of his adjudication in bankruptcy, could not be taken into consideration in determining the amount of damages, if any; and (9) that, if plaintiff was entitled to recover, the fair value of the time lost as a result of the injury from the date thereof to the day of the adjudication of bankruptcy could not be considered as an element of damage—which requests the court refused to charge.

RUGG, J. Four contentions have been argued in behalf of the defendant. His other exceptions are treated as waived.

* * *

4. Several questions are raised respecting the effect upon the plaintiff's right to maintain his action and the damages he may recover, growing out of the fact that in March, 1904, he was duly adjudged a bankrupt and the ordinary proceedings were had; the accident having occurred on the 11th day of July, 1902, and this action having been begun on the 9th of August, 1902. It is first urged that the plaintiff is debarred from the right to maintain his action by reason of the bankruptcy. The bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]) provides in § 70*a* that "the trustee * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt, * * * to all (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him; * * * (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to his property." This action, having been brought for damages to the person of the plaintiff, could not by any means have been transferred by him. Rice v. Stone, 1 Allen, 566; Robinson v. Wiley, 188 Mass. 533, 74 N. E. 923; Flynn v. Butler, 189 Mass. 377-389, 75 N. E. 730. It was not property nor a right of property until it was reduced to a judgment. Stone v. Boston & Maine Railroad, 7 Gray, 539. It could not be reached by trustee process. Thayer v. Southwick, 8 Gray, 229; Wilde v. Mahaney, 183 Mass. 455, 67 N. E. 337, 62 L. R. A. 813. Nor could it be reached in equity by a creditors' bill. Bennett v. Sweet, 171 Mass. 600, 51 N. E. 183; Billings v. Marsh, 153 Mass. 311, 26 N. E. 1000, 10 L. R. A. 764, 25 Am. St. Rep. 635. The liability being disputed, the claim was not

subject to taxation and therefore could not be levied upon or reached by the assessor or tax collector. Deane v. Hathaway, 136 Mass. 129. Thus it appears that the claim which the plaintiff was prosecuting against the defendant is not properly described by any of the phraseology in subsection 5. Subsection 6 is limited to rights of action arising upon contract or respecting property and does not include an action of tort for personal injuries. It is not, and never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish or outraged feelings of a bankrupt. None of the federal or English bankruptcy acts, nor our own insolvency statutes, have gone to that length. It has been held that the following actions do not pass to the trustee or assignee: Malicious prosecution (In re Haensell [D. C.] 91 Fed. 357; Noonan v. Orton, 34 Wis. 259, 17 Am. Rep. 441; Francis v. Burnett, 84 Ky. 223); slander (Dillard v. Collins, 25 Grat. [Va.] 343); seduction of servant (Howard v. Crowther, 8 M. & W. 601); malicious attachment (Brewer v. Dew, 11 M. & W. 625); deceit (In re Crocket, Fed. Cas. No. 3,402); malicious trespass (Rogers v. Spence, 12 Cl. & Fin. 700); trespass to ship (Bird v. Hempsted, 3 Day [Conn.] 272, 3 Am. Dec. 269); trespass accompanied by personal annoyance (Rose v. Buckett [1901] 2 K. B. 449; negligence of an attorney (Wetherell v. Julius, 10 C. B. 267). See Tinker v. Colwell, 193 U. S. 473.

It is also urged that the plaintiff is not entitled to recover, as an element of damage, for the wages which he would have earned between the date of his accident and his adjudication in bankruptcy. If the defendant's requests for instructions be construed narrowly, they were properly refused, for the reason that under the bankruptcy act property acquired between the date of the filing of the petition and the date of the adjudication in bankruptcy does not pass. But, looking at the question broadly, the contention cannot be sustained. The cause of action for which the plaintiff was entitled to recover damages on account of the pain and suffering which he had endured and was likely to endure, as well as his loss of time, was indivisible. Doran v. Cohen, 147 Mass. 342, 17 N. E. 647. Moreover, the wages which the plaintiff might have earned, if not injured, are not strictly recoverable. The value of his time, while prevented from working by reason of the negligence of the defendant, is a proper element to be considered in fixing the damages. Braithwaite v. Hall, 168 Mass. 38, 46 N. E. 398; Whipple v. Rich, 180 Mass.

477, 63 N. E. 5. The personal injury is the gist of the action. The other elements of damage are incidents only of this main cause of action. Prayers 8 and 9 were therefore properly refused.

The final question argued was that the plaintiff was not entitled to recover for debts incurred for physicians' services, never paid by the plaintiff, but proved against his estate in bankruptcy or included in his schedules. A plaintiff in an action for personal injury is entitled to recover for reasonable expenditures for nursing and physicians' care rendered necessary by the wrongful act of the defendant. Turner v. B. & M. R. R., 158 Mass. 261, 33 N. E. 520; McGarrahan v. N. Y., N. H. & H. R. R., 171 Mass. 211, 50 N. E. 610; Atwood v. Boston Forwarding & Transfer Co., 185 Mass. 557, 71 N. E. 72; Scullane v. Kellogg, 169 Mass. 544, 48 N. E. 622. It may be assumed that the bills incurred by the present plaintiff for physicians' services would be barred by his discharge in bankruptcy. This fact, however, does not prevent the plaintiff from treating such obligations as debts of honor. It is through no virtue of the defendant that the plaintiff will be enabled to interpose any defense to the payment of a reasonable charge for these services for the amelioration of his suffering, but rather the clemency of the law to his financial distress. Under these circumstances, the law ought not to prevent or discourage the exercise of a debtor's conscience respecting his past indebtedness. See Klein v. Thompson, 19 Ohio St. 569; Denver, etc., Co. v. Lorentzen, 79 Fed. 291, 24 C. C. A. 592.

Exceptions overruled.

In re GAY et al.

182 Fed. 260

(District Court, D. Massachusetts. July 16, 1910)

DODGE, District Judge. At the time of the bankruptcy an action of tort was pending in the Massachusetts Superior Court, which the bankrupts had brought against the firm of Tucker, Anthony & Co. The declaration alleged that the bankrupts, who were dealers in stocks and bonds, had been induced to buy certain bonds from the defendants, who were in the same business, at prices greater than their value, by false and fraudulent representations made by the defendants regarding facts materially affecting the value of the bonds. Damages were claimed for al-

leged losses to the plaintiff resulting from the purchase. The question to be decided is: Were the bankrupts' rights of action asserted in this suit "rights of action arising * * * from * * * injury to [the bankrupts'] property," so as to pass to the trustee under § 70*a* (6) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]).

Assuming that the bankrupts were in fact induced, as their declaration alleged, to pay $239,594.44 for bonds having no such real value, by means of false and fraudulent representations such as the declaration set forth, I think it may be said, as a matter of fair and reasonable construction, that their right of action arose from injury to their property. If those were the facts, they lost by the deceit practiced upon them money then belonging to them which might otherwise have been available to meet their obligations. This construction of clause 6 has the support of a recent decision by the District Court for the Northern District of New York. In re Harper, 175 Fed. 412. A trustee in bankruptcy was there allowed to set off against a claim for goods sold and delivered a counterclaim for damages to the bankrupt, caused by the creditor's deceit in connection with the sale. The bankrupt's claim for damages by the deceit was held to have passed to the trustee, because, if deceived as the bankrupt alleged, his money had thereby been lost and his estate diminished. It was held (p. 421) that the trustee might therefore establish the claim for damages as a counterclaim before the referee, unless some other mode of establishing and liquidating it should be directed.

It is urged on the bankrupt's behalf that the court does not appear in Re Harper to have held the right of action for the deceit a right which may be properly described as a right arising from injury to the bankrupt's property, but to have held only that it passed to the trustee because made assignable by the New York Code. Such a right of action, it is said, is not assignable under the law of Massachusetts, and the decision is, therefore, of no authority here. But if the right of action dealt with in Re Harper belonged to the trustee only because assignable in New York, and not because a right arising from injury to the bankrupt's property, it belonged to him, not by virtue of subdivision 6 of § 70*a* but by virtue of subdivision 5, or, in other words, because it was property transferable by the bankrupt, or which might have been sold under judicial process against him. See

Remington, Bankruptcy, § 1019, p. 569. And the court expressly says in Re Harper, at p. 418 of 175 Fed.:

"It is self-evident, I think, that rights of action for unliquidated damages for false and fraudulent representations, * * * whether assignable or not, are not regarded as property under subdivision 5."

The decision, as I understand it, holds the trustee entitled to the right of action only because subdivision 6 gives it to him. The definition of "injury to property" in the New York Code is discussed, because a definition of words used in subdivision 6, and the New York decisions bearing upon the Code definition are quoted only as interpreting and illustrating that definition. The Code can hardly have been supposed capable of making "injury to property" in subdivision 6 mean something in New York which it does not mean elsewhere. I am unable to see in this contention any reason for declining to follow In re Harper.

No other decision has been found which deals with this question as presented under the present bankruptcy act. Under the bankruptcy act of 1867 the rights of action belonging to a bankrupt which were to pass to his assignee were those "arising from an unlawful taking or detention or injury to his property." Rev. St. § 5046. The language used may be regarded as substantially identical, for the purposes of the question under consideration, with that of clause 6. Two decisions under that act are relied on by the bankrupts. They are In re Crockett, 2 Ben. 514, Fed. Cas. No. 3,402, and In re Brick, 4 Fed. 804. In the first of these cases the question was whether there were any assets in existence belonging to a partnership which had been dissolved. A suit which the partnership had brought to recover damages for fraudulently and deceitfully recommending a person, to whom it had sold goods, as worthy of trust and confidence, was held to be not within the description of the assets which pass to the assignee in bankruptcy. The court said:

"It is not a debt, or a security for a debt, or a right in equity, or a chose in action, or a right of action for property. Nor is it a right of action or a cause of action arising from contract. It is an action of tort for the fraud and deceit, and not an action on a contract."

The question was not further discussed. In the second case it was held, largely on the authority of the first, that a pending suit by the bankrupt for false and fraudulent representations as to its solvency, made by an officer of a company to which a

firm, whereof the bankrupt was a member, had sold iron, taking a promissory note of the company in payment, was not a partnership asset, so that failure to include it in his schedules would vacate his discharge. The court said that the language of § 5046 did not include causes of action arising *ex delicto*, a statement which, as will appear, I must regard as too broad.

Another decision under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), also relied on by the bankrupts, is Tufts v. Matthews, 10 Fed. 609, decided by the Circuit Court in this district. In that case the purchaser of a right of action originally belonging to a bankrupt, from his assignee, sold it to another who brought suit in his own name. The right of action was for deceit, and the deceit consisted in false representations inducing the surrender of certain bonds, deposited as security for the defendant's notes. The defendant's demurrer was sustained, partly on the ground that the plaintiff could not sue in his own name, and partly because of the doubt whether the claim was transferable by the assignee in bankruptcy, or by the purchaser from him, even if it ever passed to the assignee under the statute. But the court also undoubtedly held that an action for personal tort, "such as a fraudulent and deceitful recommendation of a person as worthy of credit whereby goods were obtained," was not a right of action which passed to the assignee under the statute. 10 Fed. 611.

The case last referred to did not, as has been stated, turn wholly upon the question whether or not the bankrupt's right of action passed to his assignee, nor do I think that I am required by what was said or decided in either case to hold that this right of action did not pass. That such a right was not assignable at common law does not seem to me to settle the question. In some states such rights of action have been made assignable by statute (as in the case of New York, above referred to); in other states, not. But the bankruptcy act, in providing among the rights of action for torts which shall and which shall not pass to the trustee, has adopted its own line of division, and this does not necessarily follow any of the distinctions observed elsewhere or for other purposes. It is recognized as a general principle in bankruptcy that the right of redress for wrongs to the bankrupt's person, feelings, or reputation does not belong to his creditors. A reason given is that the discretion as to whether such redress should be sought ought not to be intrusted to any one but the very person who has received the injury (Lowell, Bank-

ruptcy, § 325); a reason which has no application where the redress sought is the recovery of money out of which the bankrupt has been cheated in a transaction entered into in the ordinary course of his business. In such a case his money loss is properly described as resulting directly from the deceit, instead of being a result merely incidental, remote, or indirect. The damage is to be classed with damage to property, rather than with damage to the feelings or person, and the right to recover it, therefore, on broad grounds, with actions which pass to the assignee, rather than with those which do not pass. Lowell, Bankruptcy, § 305. In England an action for false representations "or other deceit sounding in damages" passes to the assignee, like actions for damage to property, real or personal. Lowell, Bankruptcy, § 307. And see, also, more recent statements of the English law in Robson, Bankruptcy (7th ed.) 423, and Williams, Bankruptcy (8th ed.) 211, 212.

As among actions of tort there are some which pass to the assignee in bankruptcy and some which do not, it would seem to be entirely possible that among actions for deceit there may be some which will pass and others which will not. As in Cutter v. Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429, an action for deceit against a lessor for false representations, inducing the plaintiff to hire from him an infected house whereby the plaintiff was made sick, the action was said to be "not for the deceit alone, the naked *injuria,* but for the damage caused by the deceit," and to be properly classed as an action for "damage to the person" within the meaning of Pub. St. Mass. 1882, c. 165, § 1, because "the nature of the damage sued for, not the nature of its cause, determines whether an action survives," so in this case, if the nature of the damage sued for be considered, rather than the mere deceit which was its cause, it may properly be described as arising from injury to property within the meaning of clause 6.

The bankrupts contend that an action cannot properly be so described unless it claims damage to some specific property, real or personal. This is based on the Massachusetts decisions construing the state statutes regulating the survival of actions. In those cases the question was whether the action could be called an action for "damage done to real or personal estate"—words which may well require a narrower construction than the language of clause 6. And, of course, the test here is not whether the action is one which survives under the Massachusetts law.

Lastly, it is urged on the bankrupts' behalf that they have

resold the bonds, or some of them, to customers of their own, under representations made by them, on their own account, to the same effect as the representations of which they complain in the suit referred to, and that any recovery in that suit ought in justice to belong to them, rather than to the trustee, because they are not discharged in bankruptcy from such claims as the purchasers of the bonds from them assert against them. If all this is properly before the court, it is, of course, a sufficient answer that no such claims can be maintained against them, save for their own independent deceit or negligence in repeating the representations of which they complain.

The order of the referee is approved and affirmed.[17]

In re COLUMBUS BUGGY CO.

143 Fed. 859, 74 C. C. A. 611

(Circuit Court of Appeals, Eighth Circuit. March 2, 1906)

SANBORN, Circuit Judge. By a statute of Oklahoma Territory an instrument in writing which evidences the conditional sale of personal property and the retention of title in the vendor until the purchase price is paid is rendered voidable at the instance of innocent purchasers or creditors of the vendee unless it is deposited in the office of the proper register. 2 Wilson's Rev. & Ann. St. Okl. 1903, p. 966, § 162. On August 4, 1903, the Washburn-Lytle Implement Company was adjudged a bankrupt upon an involuntary petition by the District Court of the United States for the Third District of Oklahoma Territory. The trustee in bankruptcy took from the possession of the bankrupt goods of the value of about $5,400, which were situated in Oklahoma and were held by the Washburn company under a contract with the Columbus Buggy Company, which had not been deposited with the proper register of deeds. The material terms of this contract were that the goods should be selected from those of the Columbus company by the Washburn company and should be shipped and billed to it as agent by the Columbus company at the latter's wholesale prices, that the Washburn company might sell the goods at such prices as it saw fit and that it would pay to the

17—See Rose v. Buckett [1901], 2 K. B. 449; Cleland v. Anderson, 75 Neb. 273; Hansen v. Wyman, 105 Minn. 491; In re Burnstine, 131 Fed. 828; Fellebrown v. Haywood, 190 Mass. 472; Epstein v. Handverker, 29 Okla. 337; First Nat'l Bank v. Lasater, 196 U. S. 115.

Columbus company the wholesale prices less 5 per cent. discount for the goods if sold in each month by the tenth day of the succeeding month, that it would keep the property insured for the benefit of the Columbus company and would bear all expenses of freight, storage and hauling, that the contract should continue in force one year and that, unless it was renewed, the Washburn company would at its expiration return that portion of the merchandise unsold and the Columbus company would repay the freight which had been paid upon this portion and that all the goods should be on consignment and the title should remain in the Columbus company and subject to its order until they were sold and paid for in cash. The Columbus company properly presented to the District Court its claim for that part of the merchandise which the Washburn Company held unsold under this contract and which the trustee had taken at the time of the adjudication, and that court denied its petition upon the ground that the contract evidenced a conditional sale and was therefore voidable under the statute of Oklahoma. The case is presented to this court by a petition to revise this ruling.

A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent.

An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale. The contract involved in this case has none of these characteristics. The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment. South Australian Ins. Co. v. Randell, L. R. 3 P. C. 101, 108; 2 Kent's Com. *589; Powder Co. v. Burkhardt, 97 U. S. 116, 24 L. ed. 973; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. ed. 1093. This contract contains a plain stipulation that the goods are at all times subject to the order of the Columbus company until they are sold and that at the expiration of the term of the contract the Washburn company will return the goods which remain unsold. It was therefore a contract of bailment for sale and it was not subject to the statute of Oklahoma regarding conditional sales. One of the most striking and familiar illustrations of its character is given by Chief Justice Gibson in McCullough v. Porter, 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68, where he says:

"Were I to put my horse in the custody of a friend, to be sold for a designated sum, with permission to retain whatever could be got beyond it, it would not be suspected that I had ceased to own him in the meantime, or that my friend would not be bound to return him, even without a stipulation, should he have failed to obtain the prescribed price."

A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage and handling and that he will hold the unsold merchandise subject to the order of the furnisher discloses a bailment for sale and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. It is not, therefore, affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers. The fact that such a contract provides that the receiver of the goods may fix the selling prices and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission and expenses does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the furnisher to transfer the title to him for that price. Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. ed. 1093; John Deere Plow Co. v. McDavid (C. C. A.) 137 Fed. 802; Metropolitan Nat. Bank v. Benedict Co., 20 C. C. A. 377, 380, 74 Fed. 182, 185; In re Galt, 56 C. C. A. 470, 473, 120 Fed. 64, 67; Union Stock-Yards, etc., Co. v. Western Land, etc., Co., 7 C. C. A. 660, 664, 59 Fed. 49, 53; Keystone Watch-Case Co. v. Fourth National Bank, 194 Pa. 535, 45 Atl. 328; In re Flanders, 67 C. C. A. 484, 134 Fed. 560; Martin v. Stratton-White Co., 1 Ind. T. 394, 37 S. W. 833; National Bank v. Goodyear, 90 Ga. 711, 726, 16 S. E. 962; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 164, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846; National Cordage Co. v. Sims, 44 Neb. 148, 153, 62 N. W. 514; Rosencranz & Weber Co. v. Hanchett, 30 Ill. App. 283, 286; Harris v. Coe, 71 Conn. 157, 41 Atl. 552, 554; W. O. Dean Co. v. Lombard, 61 Ill. App. 94, 97; Norton & Co. v. Melick, 97 Iowa, 564, 566, 66 N. W. 780; Lenz v. Harrison, 148 Ill. 598, 36 N. E. 567, 569.

The order of the referee which denied the application of the Columbus Buggy Company and the order of the District Court

which confirmed that order must be vacated, and the case must be remanded to the court below with directions to grant the petition of the Columbus Buggy Company for the delivery to it of all the goods remaining in the hands of the trustee which were received by him from the bankrupt, and which had been obtained by the latter from the Columbus company under the contract between them, and that the trustee also pay over to the Columbus company the proceeds of all goods of this character which he received from the bankrupt and has since sold, and it is so ordered.[18]

In re ALLEN

183 Fed. 172

(District Court, E. D. Arkansas, W. D. November 23, 1910)

The Heim Brewery Company filed its intervention for a number of casks and cases containing empty beer bottles in the possession of the trustee of the estate of the bankrupt, claiming to be the owner thereof and entitled to the immediate possession. The claim is based upon the following contract:

"Contract.

"Little Rock, Ark., April 22, 1910.

"This contract is entered into on this date between the Heim Brewery of Kansas City, Mo., and Allen & Kirkland, liquor dealers, Little Rock, Ark. Allen & Kirkland agree to purchase bottled beer in carload lots, f. o. b. Kansas City, Mo., at the following prices: Kyffhauser beer, 4 doz. small bottles in cases, $3.10. Kyffhauser beer, 2 doz. large bottles in cases, $3.10. Heim Brewery agrees to allow a rebate of $1.50 for each case of empty bottles returned to the Heim Brewery, containing either 4 dozen small, or 2 dozen large bottles, and pay return freight charges on all empty bottles to the Brewery in carload lots. It is mutually agreed that Allen & Kirkland are to pay the net price only on the bottled beer, but it is distinctly understood and agreed to by Allen & Kirkland that they pay cash for all cases or bottles not returned to the Heim Brewery, at the rate of $1.50 per case for either large or small bottles. It is further agreed that the dating on the first car of beer shipped

18—See Ludvigh v. Am. Woolen Co., 231 U. S. 522; Thomas v. Field-Brundage Co., 215 Fed. 891.

to Allen & Kirkland is for sixty (60) days' credit, and every car thereafter is to be paid for in thirty days from date of the arrival of the beer in Little Rock. Heim Brewery agrees to give Allen & Kirkland five cases of pints free in each car to aid in drayage and advertising same, and also a two per cent. discount on all cars of beer they pay for in thirty days from the arrival of said beer in Little Rock, which includes the first car shipped.

"[Signed] John Q. Allen.
"D. O. Kirkland."

The trustee denied that under the contract the intervener was the owner of the property, but insists that the property claimed belongs to the bankrupt's estate.

The cause was submitted upon an agreed statement of facts, which shows that under that contract the bankrupt bought large quantities of beer from the intervener; that the beer was delivered in cases containing bottles and in casks containing bottles bearing the individual brand and registered copyright of the intervener; that a part of said casks, cases, and bottles have been returned; but that the trustee is now in possession of a number claimed by the intervener. Upon a hearing before the referee, he found in favor of the intervener. The cause now comes before the court on petition for review by the trustee.

TRIEBER, D. J. (after stating the facts as above). On behalf of the intervener, it is claimed that, until the articles claimed are paid for by the vendee, it is merely a bailment, and he is entitled to a return of them, or, at most, that it was an option to purchase. On the other hand, it is claimed on the part of the trustee that it was a contract of "sale and return."

A "bailment" is properly defined as being a delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored by the bailee as soon as the purpose of the bailment shall be served. 2 Kent, Com. 558.

On the other hand, a "contract of sale" is when there is an agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and pay the agreed price. An "option to purchase" is merely an agreement whereby the vendee may, upon compliance with certain terms and conditions, become the owner of the property; the vendor giving him that option.

The leading case upon which the intervener relies is Westcott v. Thompson, 18 N. Y. 363. In that case the contract was for the sale of beer and provided for the sale of the beer to the vendee at a certain price. The beer was to be shipped in barrels and the barrels to be returned to the plaintiff when emptied of the beer, and if not returned the vendee was to pay for every barrel not returned the sum of $2, and thereupon become the owner thereof. On the other hand, in the case at bar, the contract provides that the vendee is to be charged and pay for the cases and bottles, but in case he wishes to return any of the cases and empty bottles he is to be allowed a rebate on his bill of $1.50 for each case of empty bottles returned to the intervener.

Is this an option to purchase or a contract of sale and return? The distinction between these two forms of agreement has been aptly pointed out in Hunt v. Wyman, 100 Mass. 198, as follows:

"An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title would not pass until the option is determined; on the other hand, the property passes at once, subject to the right to rescind and return."

See, also, Guss v. Nelson, 200 U. S. 298, 26 Sup. Ct. 260, 50 L. ed. 489; In re Schindler (D. C.), 158 Fed. 458; Hotchkiss v. Higgins, 52 Conn. 205, 52 Am. Rep. 582; Martin v. Adams, 104 Mass. 262.

Applying this rule to the contract between the intervener and the bankrupt, it clearly appears that it was not an option to purchase, but a contract of sale and return, while, on the other hand, the contract in Westcott v. Thompson was merely an option to purchase. In the latter case it was optionary with the vendee to keep the empty barrels and pay the sum of $2 for each barrel kept by him or to return them. In the case at bar the bankrupt was charged and promised to pay for the cases and bottles unless he desired to return the same, and if he did he was to be paid or given credit on his account therefor the sum of $1.50 for each case and bottles therein.

Great stress is laid upon the fact that under the contract the bankrupt was to pay the net price only on the bottled beer, still the charge was made against him, and until he returned them he was liable to the intervener who had a cause of action against him. In Herryford v. Davis, 102 U. S. 235, 26 L. ed. 160, the contract between the parties spoke of the cars sold as being leased until paid for, but notes were executed by the vendee for

the full purchase money. The cars, before they were paid for, having been seized under execution, the vendor claimed them as his property, but the court held that calling it a lease did not make it so, nor was it a conditional sale, but merely an attempt to retain a lien for the purchase money, and, the same not having been recorded as required by the laws of the state of Missouri, it was void as against creditors.

In re Rahilly v. Wilson, 3 Dill. 420, Fed. Cas. No. 11,532, grain was stored in a warehouse with the understanding that it should be sold by the warehouseman, and when the depositor would surrender the receipt therefor the warehouseman had the right to return an equal amount of grain of equal quality or pay the then market price of the grain. Upon these facts it was held by Judge Dillon that it was a sale and not a bailment. The distinction between bailments and sales is clearly shown by the opinion of that eminent jurist, who carefully reviews the authorities on that subject.

In Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. ed. 1093, the court held that "a transaction is a 'sale,' as distinguished from a 'bailment,' when there is no obligation to return the specified article." In this case there was no obligation on the part of the bankrupt to return the property claimed by the intervener; but, if he saw proper, he had the right to do so and receive a credit for the amount specified in the agreement. If the property had been destroyed by fire or by any other cause, even if without any fault or negligence on the part of the bankrupt, the loss or destruction would still have fallen on him. This is the rule applicable to contracts of sale and return. Moss v. Sweet, 16 Q. B. 493; Martineau v. Kitching, L. R. 7 Q. B. 436; Schlesinger v. Stratton, 9 R. I. 578.

As this was a contract of sale and return and not a mere option to purchase, nor a bailment in any sense, the title passed to the bankrupt, and the trustee is entitled to the possession of the property.

The finding of the referee will be set aside, and judgment entered dismissing the intervention, with costs.

In re GOLD

210 Fed. 410, 127 C. C. A. 142

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913)

The bankrupt, who was a furrier doing a retail business in the city of Chicago, on or about August 10, 1910, approached appellants, who were wholesale furriers in the city of New York, with a view to securing a line of credit in the purchase of furs. She represented that she was worth between $5,000 and $6,000 above all her debts, which, she stated to appellants, did not exceed $1,000. Relying upon her representations, appellants sold and delivered to her at two different dates furs amounting in value to the sum of $926.25. After receiving said furs, she proceeded to conceal the same and, with intent to defraud appellants, shipped a large part of the same out of Chicago. Within two months thereafter she was adjudged an involuntary bankrupt. Then, for the first time, appellants learned of the fraud through which she had obtained the goods. In the meantime, the trustee took steps to recover the furs so concealed and shipped out of the city, and did recover a portion of appellants' said furs, of the value of $425. On learning of said fraudulent conduct and said bankruptcy proceedings, appellants rescinded said sales and at once petitioned the court for the return of said recovered furs or the proceeds thereof to them, the same having been sold by the trustee pending such proceedings, all of which steps they took after the furs had come into the possession of the trustee. The matter was heard before the referee, who found that the trustee's title to said goods, under § 47*a* (2) of the bankruptcy act as amended June 25, 1910, was superior to that of appellants', and dismissed appellants' petition for want of equity. Thereupon the referee filed with the District Court a certificate for review, wherein he stated that under the undisputed evidence adduced on the hearing of appellants' petition, "said petitioners [the appellants] were entitled to reclaim said goods and were entitled to the proceeds of the sale thereof, if, under the bankruptcy law as amended by the act of June 25, 1910, a vendor of goods who has been induced to sell such goods by false and fraudulent representations, can, under any circumstances appearing in evidence, reclaim such goods from the trustee in bankruptcy of the vendee." Upon the hearing upon said petition for review and the said referee's certificate, the

District Court affirmed the action of the referee in dismissing said petition. The cause is before us on appeal from that order. The errors assigned, in substance, resolve themselves into the one proposition, viz., the court erred in holding that the rights of the appellants were inferior, under the facts of the case, to those of the trustee.

KOHLSAAT, Circuit Judge (after stating the facts as above). § 47*a* (2) of the Bankruptcy Act as the same was amended by the act of June 25, 1910, reads as follows, viz.:

"And such trustee, as to all property in the custody or coming into the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

By the order of the court affirming the referee's action upon the petition for review, the court in effect held that under the statute as amended, and under the laws of Illinois as construed by the courts of that state, the rights of a defrauded vendor were inferior to those of "a creditor holding a lien by legal or equitable proceedings," and that the latter has the rights of a *bona fide* purchaser for value without notice of the fraud. The question is one of Illinois law. In support of this proposition, the trustee cites a number of cases from Illinois, the doctrine of which is fully summed up in Van Duzor v. Allen, 90 Ill. 499. In that case it appears that one Gaston bought of Van Duzor a threshing machine. Van Duzor claimed that Gaston was to have given his notes with sureties. Gaston insisted his notes were to be secured by chattel mortgage on the thresher. Gaston was given possession without the delivery of security, and proceeded to thresh for those desiring his services, for more than two months, said question of the nature of the security to be given still remaining unsettled, when judgments against him were obtained in favor of persons who had rendered services to him in threshing, upon which judgment executions were sworn out and placed in the hands of a constable, who levied upon the thresher. Van Duzor replevied the latter. On the trial of the replevin suit, Van Duzor was defeated. On appeal the Supreme Court affirmed the judgment. In its opinion the court said:

"A *bona fide* creditor, who, under a judgment and execution, acquires a lien on property thus situated, occupies the same position in all respects as does a *bona fide* purchaser. Where the apparent owner of property thus acquired has the *indicia* of ownership and may sell and pass a good title to a purchaser, without notice, a *bona fide* creditor may seize the property on execution and sell it thereunder and pass the title, not only against the apparent, but also the real owner."

This decision must be construed with reference to the facts of the case. The question of the rights of a defrauded vendor were not under consideration. Whatever lien, if any, Van Duzor possessed as against Allen, was a secret lien and was not made a condition of the passing of the title. Allen actually had title. This case states the law of Illinois as it stands today. Further cases cited by the trustee in support of this doctrine are Union Stockyards & Transit Co. et al. v. Mallory, 157 Ill. 565-566, 41 N. E. 888, 48 Am. St. Rep. 341; Brundage v. Camp, 21 Ill. 330; Fawcett v. Osborn, 32 Ill. 411, 83 Am. Dec. 278; Chicago Dock Co. v. Foster, 48 Ill. 507; Doane v. Lockwood, 115 Ill. 490, 4 N. E. 500; Butters v. Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Farwell v. Hanchett, 120 Ill. 577, 11 N. E. 875.

None of these, however, apply to the facts of the case at bar. This clearly appears from the decisions of the Illinois courts. The leading case is that of Schweizer v. Tracy, 76 Ill. 345, the facts of which are very similar to those of the case at bar. There the purchaser had obtained the goods through fraudulent representations as to his financial circumstances. After possession taken, the goods were levied upon under a writ of attachment issued against the fraudulent vendee. The defrauded vendors instituted a suit in replevin in which they were defeated and the return of the property to the sheriff awarded. Having failed to return the goods, suit was instituted upon the replevin bond, in which suit Schweizer was impleaded with the defrauded vendors. In the lower court judgment went for the plaintiff in that suit. On appeal the judgment was reversed. In the course of its opinion the court said:

"Coming, then, to the conclusion which we do, that had Mack, Stadler & Co. discovered the fraud practiced upon them whilst the goods remained in the hands of the fraudulent vendee, and replevied them, they could have successfully maintained their action, the question is presented, whether the attaching creditors here, or the sheriff, by virtue of his writ of attachment,

acquired any other or greater title than the fraudulent vendee possessed. Had the vendee, before the reclaiming of the goods by Mack, Stadler & Co., sold them to an innocent purchaser for value, no doubt, under the decisions of this court, the purchaser would have acquired a valid title to the goods''—citing Jennings v. Gage et al., 13 Ill. 610, 56 Am. Dec. 476; M. C. R. R. Co. v. Phillips et al., 60 Ill. 190; Young et al. v. Bradley et al., 68 Ill. 553.

The court thereupon proceeded to explain the language in Burnell v. Robertson, 5 Gilman (Ill.) 282, and said:

''That case was a case where a debtor had title to the property, and the controversy was between a prior purchaser from the debtor, who had not obtained possession of the property, and a subsequent attaching creditor; and in reference to such a state of facts, the court says: 'In case of two sales of personal property, both equally valid, his is the better right who first gets possession of the property, and the attaching creditor stands in the light of a purchaser and is to be protected as such.' That is, the attaching creditor stands in the light of a purchaser, not necessarily as against the world, but as against another purchaser, the creditor having, by virtue of his attachment, first obtained possession of the property; thus acknowledging the common doctrine respecting the sale of personal property, that a sale without the delivery of possession, is void as against subsequent purchasers and creditors. This is the full import of that decision. But in the case at bar, the only title of the debtor is one acquired by fraud and false representations, and voidable at the option of his vendors. The general expression used in the case cited is to be understood with reference to the facts of that case, and is not authority in support of the view, that an attaching creditor, under the circumstances of such a case as the present, as against the vendor, stands in the same position as an innocent purchaser for value.''

The court further in said opinion said there was no difference as to priority of lien between an attachment lienor and an execution lien, citing Tousley v. Tousley, 5 Ohio St. 78; that the attachment creditor took no better title than the fraudulent vendee possessed, and proceeded to hold that the right of possession was in the defrauded vendor and that there was no liability upon the replevin bond. This case was decided prior to Van Duzor v. Allen, *supra,* but has been approved in a number of subsequent cases. In Walsh v. First National Bank, 228

Ill. 446, 81 N. E. 1067, the court held that the transferee of a bill of lading prevailed over an attaching creditor, and says:

"In such a case an attachment creditor only obtains the rights which the debtor has in the property at the time of the levy of the writ. One claiming to be a creditor of another and levying a writ of attachment is not a *bona fide* purchaser for a valuable consideration"—citing, among other authorities, Schweizer v. Tracy, *supra.*

The latter case is cited approvingly in Hacker v. Munroe & Son, 176 Ill. 394, 52 N. E. 12; King & Co. v. Brown, 24 Ill. App. 579-582; Gould v. Howell, 32 Ill. App. 349-350; O'Neil v. Patterson & Co., 52 Ill. App. 27-33; Nonotuck Silk Co. v. Levy, 75 Ill. App. 55-58; La Salle Pressed Brick Co. v. Coe, 65 Ill. App. 619-622; Link v. Gibson, 93 Ill. App. 433-435; Magerstadt v. Schaefer, 110 Ill. App. 171, and other cases. The same rule of law is laid down in Doane v. Lockwood, *supra;* Staver & Abbott Mfg. Co. v. Coe, 49 Ill. App. 426-431.

From the foregoing it appears that the rule laid down in Schweizer v. Tracy, *supra,* is here controlling. The vendors having at the earliest opportunity rescinded the sale, the title to the furs in question never passed to the bankrupt, by reason of her fraudulent representations to the vendors, therefore the trustee took no title thereto inasmuch as, under the laws of Illinois, as construed by the courts of the state, the rights of the defrauded vendor prevailed over the claims "of a creditor holding a lien by legal or equitable proceedings thereon."

* * *

The judgment of the District Court is reversed, with direction to vacate its decree herein and grant the prayer of the petition to the amount of $425.

SHERMAN v. LUCKHARDT

67 Kans. 682, 74 Pac. 277

(Supreme Court of Kansas. Nov. 7, 1903)

POLLOCK, J. This case is before us upon rehearing. It has been fully rebriefed and reargued. The facts will be found stated in the former opinion of this court. 65 Kan. 610, 70 Pac. 702. The law there declared reads: "A preferential payment by a debtor to one of his creditors within four months prior to the former's bankruptcy is not void under clause 'b,' § 60, and

clause 'e,' § 67, Bankr. Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449], though made with a fraudulent intent on the debtor's part, if it be accepted by the creditor without knowledge of such intent, and without knowledge that a preference was intended." The question is, shall that decision now be upheld or overruled? Prior to the passage of the national bankrupt act of July 1, 1898 (c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), in this and other jurisdictions the estate of an insolvent debtor was often swept away in an unequal division among his creditors, leaving unsatisfied demands to harass and annoy the debtor. The intent of the lawmaking power in the passage of this act was twofold: First, the protection and discharge from liability of the bankrupt; second, the equal distribution of his nonexempt property among his creditors in proportion to their provable demands. Swarts v. Fourth National Bank, 117 Fed. 3, 54 C. C. A. 387; In re Gutwillig, 92 Fed. 337, 34 C. C. A. 379. One of the methods employed by the insolvent debtor to effect an unequal distribution of his estate among his creditors before the passage of this act was, without any fraudulent intent on his part, to prefer one or more of his creditors over others. Another method was to transfer a portion or all of his property to one or more of his creditors to the exclusion of all others, with the intent on his part to hinder, delay, and defraud his other creditors. In the case first mentioned the transfer was without fraud, and therefore valid. In the second case, the transfer having been made without any guilty knowledge on the part of, or participation in the fraudulent act of the debtor by, the creditor, the transfer was upheld as valid. To remedy this, among other existing evils, the act was passed.

In the case at bar it is found by the court, from the evidence, as follows: "(8) That the said William Luckhardt, in causing the above-described real estate to be conveyed to this defendant, intended thereby to prefer this defendant over his other creditors. (9) That the said William Luckhardt, in causing the above-described real estate to be deeded to this defendant, intended thereby to hinder, delay, and defraud his other creditors. (10) That the said defendant was not a purchaser of said real estate in good faith and for a present fair consideration." "(12) That upon the trial of this action the counsel for plaintiff admitted that the said William Luckhardt, at the time he caused to be conveyed to the defendant the real estate hereinabove described,

was indebted to the said defendant in the sum of $1,500, and that it was further admitted that the said defendant, M. M. Luckhardt, at the time she received and accepted the conveyance of said premises to herself, had no knowledge of the insolvency of her husband, William Luckhardt, nor of his intention or purpose to defraud, hinder, or delay his creditors in the collection of their debts by means of said conveyance to her of said real estate; that the defendant had no knowledge of the plaintiff's intention to make her a preferred creditor; and that the reasonable value of the real estate conveyed to her was $1,500."

The contention of the parties to this controversy is this: On the one hand, the trustee claims the conveyance, under finding 10 of the court, is condemned by, and may be avoided under the provisions of, clause "e" of § 67 of the act, which provides "that all conveyances, transfers, assignments or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of this petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

The defendant contends, under findings 9 and 12, above quoted, the conveyance was a preference, and having been received by the creditor without knowledge on her part of the insolvency of the debtor, or his intent to hinder, delay, and defraud his other creditors, or to prefer her over other creditors, it must be upheld. Clause "b" of § 60 of the act reads: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give

a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." Clause "g" of § 57 reads: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]. Under these provisions of the act, upon the findings made by the court, and viewed alone in the light of a preference only, we are of the opinion the contention of defendant would prevail, but the condemnation of the act does not end here. The clauses quoted from § 57 and § 60 treat only the subject of preferences. No mention is there made of fraud. The lawmaking power dealt with the subject of fraud in clause "e" of § 67 of the act, and, in language so plain, concise, exact, and unequivocal as to leave no room for doubt or construction, there inhibited all transfers of the property of an insolvent debtor made within four months prior to the institution of bankruptcy proceedings under the act wherein the debtor, with the intent on his part of hindering, delaying, or defrauding his creditors, parted with his property regardless of the knowledge of or participation in such fraud by the creditor. This is a case of first instance in this state in construing the above provisions of the act. In other jurisdictions a like view of the act has been reached. Friedman v. Verchofsky, 105 Ill. App. 414; Unmack v. Douglass (75 Conn. 633), 55 Atl. 12. There are cases holding a contrary view. Congleton v. Schreihofer et al. (N. J. Ch.) 54 Atl. 144; Gamble v. Elkin et al. (205 Pa. St. 226), 54 Atl. 782. However, the reasoning employed in these cases, contrary to the view expressed in this opinion, does not commend itself to our judgment or meet our approval. Such a construction of the act would nullify one of its most important and beneficial provisions, and, in so far as the act deals with fraudulent transfers of the property of an insolvent debtor, the law would remain the same as before the passage of the act; and this notwithstanding the act prohibits all conveyances, transfers, assignments, or incumbrances of the property of the insolvent debtor within four months prior to the filing of the petition in bankruptcy with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, "except as to purchasers in good faith and for a present fair consideration," in which case the estate of the bankrupt to be distributed is not diminished, and also notwithstanding the fact that the act itself avoids all transfers which might be avoided under existing state laws.

It follows, upon the findings made by the trial court, the trustee is entitled to judgment in his favor setting aside the conveyance made. Therefore the former opinion of this court (65 Kan. 610, 70 Pac. 702) must be overruled, the judgment below reversed, and cause remanded, with direction to enter judgment in favor of the trustee.

CUNNINGHAM, BURCH, and MASON, JJ., concur.[19]

JOHNSTON, C. J., and SMITH and GREENE, JJ., dissent from the reasoning and conclusions of this opinion for the reasons stated in the majority opinion on the original hearing.

BEASLEY v. COGGINS et ux.

48 Fla. 215, 37 So. 213

(Supreme Court of Florida, Division A. July 13, 1904)

The appellant, D. P. Beasley, filed his bill in the Circuit Court of Madison county as trustee in bankruptcy of P. S. Coggins, alleging that the said Coggins was adjudged a bankrupt by the United States District Court on July 8, 1902; that he (Beasley) was duly selected and appointed as trustee in bankruptcy of and for all the estate of said Coggins, and was then such trustee, as shown by exhibits attached.

The bill alleges substantially that P. S. Coggins, prior to being adjudged a bankrupt, was engaged in the mercantile business at the city of Madison, in Madison county, and had been so engaged for several years prior thereto, and had then contracted a large amount of indebtedness with various creditors, of about $12,000.

The bill sets forth an indebtedness to several persons, including the Bank of Madison, on several notes, all due on March 8, 1901, and other debts contracted subsequent to March 8, 1901, and all unpaid and due when the bill was filed; that Coggins, being so indebted on March 8, 1901, in a large sum of money, intended a continuance for an indefinite period of his said mercantile business, contemplated the creation of further indebted-

19—See Jacobs v. Van Sickle, 127 Fed. 62; Wright v. Sampter, 152 Fed. 196; Underleak v. Scott, 117 Minn. 136; Coder v. Arts, 213 U. S. 223; Sherman v. Luckhardt, 96 Mo. App. 320; Schilling v. Curran, 30 Mont. 370; Lehrenkrauss v. Bonnell, 122 N. Y. Supp. 866; Clowe v. Seavey, 208 N. Y. 496.

ness, and was then, on said March 8, 1901, insolvent; that on said March 8, 1901, said Coggins and his wife, Lilla F., executed a deed of certain landed property to W. F. Parramore upon an alleged and fictitious consideration of $50, and that Parramore on the same day conveyed said property to Lilla F. Coggins for an alleged and fictitious consideration of $50; that said deeds were properly recorded on March 9, 1901; that the lots so conveyed, upon information and belief, are worth $3,500; that said lots of land were on March 8, 1901, the property of P. S. Coggins; that it was the purpose of Coggins, by the recited deeds, to make a gift of said lots of land to his wife, Lilla F. Coggins, without any valuable consideration; that said deeds were made, contrived, and executed of covin and collusion by the parties, to the end, purpose, and intent that the creditors of Coggins, both prior and subsequent, should be delayed, defrauded, and defeated in the collection of their lawful and just debts and demands against Coggins; and that said deeds are fraudulent and utterly void, as against the claims and demands of the creditors of Coggins.

The bill, among other things, prays a decree declaring said deeds to be fraudulent and void against the claims and demands of creditors; that the real estate thereby attempted to be conveyed be sold, and the proceeds paid to the trustee in bankruptcy, to be disposed of in the regular administration of the estate of the bankrupt. Copies of the deeds are made exhibits to the bill, and also a copy of the order appointing the complainant as trustee in bankruptcy.

The defendants demurred to this bill on the following grounds, in substance, viz.: (1) That the bill does not make out a case entitling complainant to discovery or relief.

(2) That it does not show any judgment or lien upon the property.

(3 and 4) That it does not show that complainant has exhausted his legal remedies, and that he has a full and adequate remedy at law.

(5) That the clauses alleging the several deeds were made to hinder and delay creditors, etc., are demurred to because: First. The same are impertinent.

Second. That all persons who became creditors after March 8, 1901, had notice of them, and that the trustee cannot claim said deeds void as to such creditors.

Third. That said deeds can only be avoided, if at all, by creditors whose claims existed at the date of said conveyances.

Upon a hearing this demurrer was sustained, and from this order an appeal was taken.

The assignments of error are, first, that the court erred in making the order sustaining the demurrer to the bill; and, second, that the court erred in holding that complainant must allege and prove a judgment at law before the bill of complaint could be maintained.

HOCKER, J. (after stating the facts). It does not appear upon what ground the court below sustained the demurrer to the bill, but presumably all the grounds were sustained.

The general rule is that, before a creditor can maintain a bill in equity to set aside a conveyance by his debtor of his real estate on the ground of fraud, the creditor must reduce his claim to judgment, or its equivalent, a decree for a balance remaining after a foreclosure sale of mortgaged property, creating a lien on such real estate; and, when personal property or equitable assets are pursued, he must have an execution issued and returned *nulla bona*. Robinson v. Springfield Company, 21 Fla. 203. But does this rule apply to such a suit by a trustee in bankruptcy?

§ 70 of the act of Congress to establish a uniform system of bankruptcy, passed July 1, 1898 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), provides: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors." In addition to the foregoing, paragraph "e," § 70 (30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]), provides: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication," etc. § 67*e* (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) treats of conveyances, transfers, etc., made by a bank-

rupt within four months prior to filing the petition, with intent to hinder, delay, or defraud creditors.

Some of the Federal Courts have found difficulty in reconciling these sections of the bankrupt act, but it seems to us that the views expressed in In re Mullen (D. C.) 101 Fed. 413, text, 416, are substantially correct. It is there said that § 70*e*, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], was intended to provide simply that the trustee in bankruptcy should have the same right to avoid conveyances as was possessed by creditors, or any of them, and this with especial reference to the statute of 13 Elizabeth. Under the bankruptcy act, when one is thereunder adjudged a bankrupt, creditors are not permitted to attack fraudulent conveyances of their debtor, made more than four months of the adjudication of bankruptcy; and, if the trustee could not do so, then the act would constitute "a device to permit fraudulent conveyances to take effect with impunity in case they are successfully concealed for the specified four months." Lewis v. Bishop, 47 App. Div. 554, text, 558, 62 N. Y. Supp. 618. It is only by holding that the trustee is subrogated to the rights of creditors against a fraudulent conveyance that full effect and operation can be given to the statute of 13 Elizabeth against fraudulent conveyances, from which our statute (§ 1991, Rev. St. 1892) is substantially taken. In Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408, the second headnote is as follows: "A trustee in bankruptcy seeking to set aside and annul a bill of sale and transfer of property previously made by the bankrupt, and alleged to have been fraudulent under the bankruptcy law, and as against creditors, may appropriately proceed by bill in equity, and will not be required to seek his remedy at law." It is true that the transfer there sought to be set aside was made three days before the petition of involuntary bankruptcy was filed, and involved a transfer rendered void, if made to hinder and delay creditors under § 67*e* of the bankruptcy act. 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]. But no reason is apparent why the same rule should not apply to fraudulent transfers covered by the cited provisions of § 70, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]. The case of Platt, Assignee, v. Matthews (D. C.) 10 Fed. 280, arose under the bankrupt law previous to that of 1898. A bill was filed by the assignee to reach property alleged to have been fraudulently transferred by the bankrupt. It was contended on demurrer that, as no creditor had a judgment and execution against the bankrupt, such a bill would not lie. The court held

that, inasmuch as the bankruptcy act vested the assignee with the title of all property conveyed by the bankrupt in fraud of creditors, the assignee acquired his rights through the act, and not through what had been done by the creditors. The court overruled the demurrer.

In Bump on Fraudulent Conveyances, § 553, it is stated that, in order for an assignee in bankruptcy to maintain a bill to set aside a fraudulent conveyance, it is not necessary that he shall have a lien on the property, and obtain a return of *nulla bona*. In Cady v. Whaling, 7 Biss. 430, Fed. Cas. No. 2,285, an assignee in bankruptcy filed a bill to set aside a fraudulent conveyance made before the bankrupt act was passed. It was contended that such a bill could not be maintained on behalf of general creditors who had no specific lien. The contention was overruled. The question is very thoroughly discussed in Mueller, Trustee, v. Bruss, 112 Wis. 406, 88 N. W. 229, where it is held that the bill might be maintained, though no judgment at law had been recovered. The deeds sought to be set aside in the case at bar were made about 14 months before P. S. Coggins was adjudged a bankrupt. At the time they were made he is alleged to have been insolvent, and the bill shows that some of the debts he owed at the time of the deed were unpaid and owing when he was adjudicated a bankrupt. The bill further alleges that the deeds of March 8, 1901, from P. S. Coggins to Parramore, and from Parramore to Mrs. Coggins, were made without valuable consideration and were voluntary.

In the case of McKeown v. Allen, 37 Fla. 490, 20 South. 556, this court held that "a voluntary conveyance by one who is indebted is presumptively fraudulent, when attacked by a judgment creditor upon a debt existing at the time of its execution." As, in our opinion, a trustee in bankruptcy occupies a relation similar to that of a judgment creditor, we think that the first four grounds of the demurrer should have been overruled.

The remaining grounds of the demurrer are directed to the allegations upon which is founded the prayer of the bill requiring the defendants to answer whether P. S. Coggins on the 8th day of March, 1901, contemplated the creation of other and further indebtedness during the conduct of his mercantile business, and whether the conveyances from Coggins to Parramore, and from Parramore to Lilla F. Coggins, were executed and contrived by the defendants and Parramore of covin and collusion, to the end, purpose, and intent that such persons as should afterwards

become the creditors of P. S. Coggins, in pursuance of his said intentions to create further indebtedness, should be delayed, hindered, and defrauded of their just and lawful debts and demands. It is contended, first, that these allegations are impertinent. We are not aware of any recognized practice in equity authorizing a defendant to raise the question of impertinence in a bill by demurrer. The recognized practice, as we understand it, is to bring the matter of impertinence to the notice of the court by motion for a reference or by exceptions. 19 Ency. Pl. & Pr. 200, 207, 208, 214; Story's Eq. Pl. (10th ed.) § 266 *et seq.;* Eastham v. Liddell, 12 Vesey, Jr., 201. But assuming the court might, on its own motion, refer a bill for impertinence, if the matter was called to its attention, we, in view of our conclusions, do not regard these allegations of the bill, or the prayer of the bill in relation thereto, as impertinent.

Under the two last grounds of demurrer it is contended that creditors who became such after the deeds from P. S. Coggins to Parramore, and from Parramore to Lilla F. Coggins, the wife of P. S. Coggins, were recorded, to wit, after the 9th day of March, 1901, had constructive notice of said deeds, and therefore such creditors could not attack said deeds as being voluntary, and that the trustee in bankruptcy occupies no more advantageous ground than such subsequent creditors.

In the case of Alston v. Rowles, 13 Fla. 118, the rights and status of subsequent creditors were referred to on p. 136. Justice Westcott there says: "The doctrine of the Supreme Court of the United States, as announced in the leading case of Sexton v. Wheaton, 8 Wheat. 229, 5 L. ed. 603, and as understood by Judge Story, is that a voluntary conveyance made by a person not indebted at the time, in favor of his wife, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary. It must be shown to be fraudulent in fact, or to be made with a view to future debts." The opinion in this case (Sexton v. Wheaton) was written by Chief Justice Marshall, and learnedly discusses the proper construction and effect to be given the statute of 13 Eliz., dealing with fraudulent conveyances as regards creditors, and the statute of 27 Eliz., dealing with fraudulent conveyances as regards purchasers. These two statutes are substantially embraced in §§ 1991, 1992, Rev. St. 1892. This case and the kindred one of Salmon v. Bennett, 1 Conn. 525, 7 Am. Dec. 237, are selected in 1 Am. Lead. Cas. 17, as the basis for very elaborate discussion and annotation. On p. *40 it is said:

"Against subsequent creditors, as is decided in Sexton v. Wheaton, a conveyance is not void unless actually fraudulent. But there is a little obscurity as to what are the frauds of which they might take advantage. If the fraud be directed specifically against subsequent creditors—that is, if a voluntary settlement be made with a view to becoming subsequently indebted, which may be inferred from the fact of debts being contracted immediately after—there is no doubt that the settlement may be avoided by subsequent creditors. But that is not the only sort of fraud that may be taken advantage of by subsequent creditors, for it is clear that if a conveyance be made colorably, with actual intent to defraud any existing creditor or creditors, it may be avoided by subsequent creditors; in other words, that evidence of collusion against existing creditors is sufficient evidence of fraud against subsequent creditors. Otherwise it would be easy to evade the statute. The party might pay off those to whom he is indebted at the time he is making the settlement, by borrowing of others, and then say to these last, 'I did not make the settlement to defraud you, but to defraud the other persons who were my creditors.'" It is stated that the foregoing doctrine is probably limited to voluntary conveyances which are accompanied, in law, by the presumption of a secret trust for the grantor. It is further said on p. *41: "An intent actually to defraud creditors is to be legally inferred from the grantor's being insolvent at the time, or greatly embarrassed, or so largely indebted that his conveyance necessarily has the effect to hinder and defraud creditors, * * * and a voluntary conveyance made under such circumstances may be set aside by a subsequent creditor." In some of the cases referred to in note 1, p. 41, we find that the registration laws have been regarded as settling the law to the extent that a subsequent creditor cannot complain of a voluntary deed of which he has constructive notice, except on the ground of actual fraud. Cooke's Lessee v. Kell, 13 Md. 469; Kane v. Roberts, 40 Md. 590. In the last case the headnote states the law as follows: "A deed fraudulent and void as against the grantor's antecedent creditors is valid, if recorded, as against subsequent creditors, when there is nothing in the deed itself, and no evidence, to show any intent or design to defraud such creditors." In the case of Walker, Evans and Cogswell v. Bollmann, 22 S. C. 512, the court held that a subsequent creditor could not attack a prior voluntary deed, of which he had notice, on the ground that it was voluntary, but that he could do so on

the ground that it was made with reference to future indebtedness, or other circumstances of fraud other than its being voluntary. Also, see Moore v. Blonheim, 19 Md. 172; Brundage v. Cheneworth, 101 Iowa, 256, 70 N. W. 211, 63 Am. St. Rep. 382; Jackson v. Plyler, 38 S. C. 496, 17 S. E. 255, 37 Am. St. Rep. 782. See, also, the following annotated cases: Jenkins v. Clement, 14 Am. Dec. 706; Hagermann v. Buchanan, 14 Am. St. Rep. 751, 752 *et seq.;* Rudy v. Austin, 35 Am. St. Rep. 85 *et seq.* On p. 752, 14 Am. St. Rep., *supra,* the annotator, discussing the effect of a conveyance as against subsequent creditors, says: "We apprehend that no general rule can be formulated equally applicable to all cases, and that such judicial declarations as have been made upon the subject must be interpreted with reference to the particular facts of the case in which they were made. If the subsequent debts were contracted long after the voluntary transfer was made, the presumption that it might have been made with a view of contracting them and of defrauding the subsequent creditors certainly becomes exceedingly weak, and may reasonably be treated as entirely destroyed, unless other circumstances appear to give it renewed vitality. The evidence may, on the other hand, disclose that the subsequent debts have merely taken the place of prior ones, or that the debtor has continued or embarked in a business in which his becoming indebted was inevitable, or there may be other circumstances of the like persuasive character, creating or strengthening the presumption that, as the transfer was in fraud of prior, it was also in fraud of subsequent, creditors." Bump on Fraudulent Conveyances (4th ed.) §§ 293-296. After a careful examination of many cases, this doctrine seems reasonable. We are unable to discover how constructive or even actual notice of the execution of a voluntary deed by a debtor could of itself inform a subsequent creditor of the secret purposes of the debtor in making the deed, of his insolvency, of his intention to contract large debts, or of his intention to engage in a hazardous enterprise, the risks of which he was seeking to avoid, or of other fraudulent and covinous purposes he might entertain, so as to shut off the subsequent creditor from attacking the voluntary deed for such or other sufficient causes. See Diggs v. McCullough, 69 Md. 592, 16 Atl. 453; Scott v. Keane, 87 Md. 709, 40 Atl. 1070, 42 L. R. A. 359; Baltimore High Grade Brick Co. v. Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148. Our opinion is that, in so far as the instant case is concerned, where the bill is filed by a trustee in bank-

ruptcy representing all classes of creditors, and where the facts are such as are here alleged, the bill is not obnoxious to the demurrer which was interposed.

It is therefore adjudged, ordered, and decreed that the order sustaining the demurrer be, and the same is hereby, reversed, and the cause remanded for further proceedings in accordance with law.

TAYLOR, C. J., and COCKRELL, J., concur.

CARTER, SHACKLEFORD, and WHITFIELD, JJ., concur in the opinion.[20]

KNAPP v. MILWAUKEE TRUST COMPANY

216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. 412

(United States Supreme Court. March 7, 1910)

Mr. Justice DAY delivered the opinion of the court:

The Standard Telephone & Electric Company, a Wisconsin corporation, was adjudicated a bankrupt in the District Court of the United States for the eastern district of Wisconsin. Under its articles of association it was authorized to carry on the business of selling appliances for telephone purposes and operating telephone exchanges. It had established and was operating a telephone exchange at the village of Sheridan, Wisconsin, and was carrying on the business of manufacturing and selling telephone apparatus in the city of Milwaukee, Wisconsin, where it had a stock in trade and trade fixtures. The trustee in bankruptcy filed a petition to sell all the property of the bankrupt. Appellant Knapp, as trustee of certain mortgages given by the telephone company, intervened, and asked to have the lien of the mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold, and the question is as to the lien of these mortgages upon the fund.

The trustee in bankruptcy answered the petition of Knapp, trustee under the mortgage, averring that it was a chattel mortgage, and fraudulent and void as to creditors, because of certain agreements contained therein, because it was on after-acquired

20—See Warren v. Moody, 122 U. S. 132.

property, and because of the failure to file an affidavit of renewal, as required by the Wisconsin statutes. The referee in bankruptcy found the facts, and held the mortgage void. Upon hearing, the district judge reached a like conclusion. 157 Fed. 106.

The Circuit Court of Appeals of the seventh circuit, upon appeal, affirmed the decree of the District Court, holding the mortgage void for the reasons set forth at large in the opinion of the district judge. 89 C. C. A. 467, 162 Fed. 675. * * *

The mortgages in question, which were upon all the property and estate of the mortgagor, acquired or to be acquired, in connection with or in relation to the business of the mortgagor, contain, among others, the following provisions:

"Nothing herein contained shall be construed to prevent said first party from carrying on, in the due and regular course, its said business, and collecting the indebtedness and moneys due or to become due therein, and applying the same to its own use, except as hereinafter provided."

The mortgage makes provision for a sinking fund of $2,000 annually, $500 quarterly, out of the proceeds of the business, or, if necessary, from the general resources; and the mortgage contains this further provision:

"Said first party further agrees that no dividend shall be declared or paid on its capital stock at any time when any portion of said sinking fund or the interest on said bonds shall not have been duly provided for, according to the terms of this indenture.

"Provided, however, That said trustee be and he is hereby empowered and authorized in his discretion, and in case he does not procure for the sinking fund any of said bonds at par and accrued interest, upon application in writing by said first party to waive the making by said party of full or any payment into or provision for said sinking fund for any quarter year, and in the event of said trustee electing not to require said first party to make such payment into or provision for such sinking fund, the moneys which would otherwise have been placed therein for the purchase of said bonds as aforesaid shall remain at the disposition of said first party, to be divided as dividends, or to enlarge, extend, improve, repair, renew, or rehabilitate its said described business and property."

It will be seen that under these provisions the mortgagor is allowed to remain in possession of the property, applying the proceeds thereof to his own use, except that no dividends shall be declared or paid without first making provision for the sink-

ing fund and the interest on the bonds, and with this important proviso,—that the trustee under the mortgage may, in his discretion, in case he does not procure for the sinking fund bonds at par and accrued interest, upon the application of the mortgagor, waive the payment into or provision for the sinking fund for any quarter year, and, in such case, the moneys which would otherwise go into the sinking fund for the purchase of bonds shall remain at the disposition of the mortgagor, to be distributed as dividends, or to be used for the benefit of the business and property in the manner described. * * *

While there was a finding that no intentional bad faith was shown, still we agree with the Court of Appeals and the district judge that, under the law of Wisconsin, as construed by her highest court, such conditions as were contained in these mortgages rendered them fraudulent in law and void as to creditors. Merchants' & M. Sav. Bank v. Lovejoy, 84 Wis. 601, 55 N. W. 108; Bank of Kaukauna v. Joannes, 98 Wis. 321, 73 N. W. 997; Charles Baumbach Co. v. Hobkirk, 104 Wis. 488, 80 N. W. 740; Franzke v. Hitchon, 105 Wis. 11, 80 N. W. 931; Durr v. Wildish, 108 Wis. 401, 84 N. W. 437.

In this case the stipulations of the mortgages practically permitted the mortgagor to dispose of the property for his own benefit, except that it must make certain provisions for a sinking fund and interest on the bonds; and, with the consent of the trustee, no provision need be made for the sinking fund or interest, and the moneys which otherwise would have been placed therein for the purchase of bonds might be applied for the benefit of the mortgagor, whether as dividends or for the benefit of its business and property. Such provisions are clearly within the Wisconsin decisions, for they permit the mortgagor to have the benefit of the property, to keep it in his possession, and to appropriate the proceeds to his own use. The Wisconsin decisions render such mortgages invalid as to creditors, because the effect of such provisions is to give the beneficial use of the mortgaged property to the mortgagor in possession, and to make possible the use of the mortgage as a protection against creditors of the mortgagor when they shall undertake to assert their rights.

But it is said the trustee in bankruptcy may not defend against these mortgages. It is contended that they are good as between the parties, and that, as to them, the trustee in bankruptcy occupies no better position than the bankrupt. This question was

raised and decided in Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789. That case arose in Wisconsin, and it was therein held that, under the Wisconsin law, an attempted pledge of property, without change of possession, was void under the laws of that state. In that case, as in this one, the question was raised as to whether the trustee in bankruptcy could question the transaction, and it was contended that, being valid as between the parties, the trustee took only the right and title of the bankrupt. The question was fully considered therein, and the previous cases in this court were reviewed. The principle was recognized that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt.

But it was held that the attempt to create a lien upon the property of the bankrupt was void as to general creditors under the laws of Wisconsin. Applying § 70*a* of the bankruptcy act, it was held that the trustee in bankruptcy was vested by operation of the bankrupt law with the title of the property transferred by the bankrupt in fraud of creditors, and also that the trustee took the property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against the bankrupt. It was therefore held that, as there had been no valid pledge of the property, for want of change of possession, it could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy, and passed to the trustee in bankruptcy.

The principles announced in Security Warehousing Co. v. Hand, *supra,* when applied to the present case, are decisive of the question here presented. Under the Wisconsin statutes and decisions of the highest court of that state the conditions contained upon the face of this mortgage were such as to render it fraudulent in law and void as to creditors, and prior to the filing of the petition in bankruptcy the property might have been levied upon and sold by judicial process against the bankrupt.

It is true that in Security Warehousing Co. v. Hand the court said that the attempted pledge was a "mere pretense, a sham;" but the courts of Wisconsin have held that such provisions as are in these mortgages, giving the bankrupt the right to dispose of the mortgaged property for its own benefit, rendered the conveyance fraudulent in law, and therefore void as to creditors. This brings the conveyance within the terms of the bankrupt act,

as one which the trustee may attack, as conclusively as it would if fraudulent intent in fact were shown to exist.

In Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229, it was held that a trustee in bankruptcy could maintain an action to set aside a fraudulent conveyance, but that the complaint must aver and the trustee must show that the estate had not sufficient assets in the trustee's hands to satisfy the claims filed against the debtor. And it is insisted that a showing of this character is lacking in the present case. Without deciding that under the bankruptcy act the answer of the trustee in bankruptcy was required to make this averment, accompanied by proof, if necessary, it is sufficient upon this point to say that the intervening petition of the trustee of the mortgage sought to assert a lien upon all the property of the bankrupt in the trustee's hands. The suggestion in appellant's brief, that the trustee in bankruptcy may possibly recover against directors and officers of the corporation for dereliction of duty, and against stockholders for unpaid subscriptions and additional liability on their part, presents no reason why he may not resist an attempt to take all the available property in his hands to apply on a mortgage void as to creditors at the time of the adjudication.

We are of opinion, for the reasons stated, that the mortgages in question are void, and that, under the bankruptcy law, the trustee can assert their invalidity.

Judgment affirmed.

THOMPSON v. FAIRBANKS

196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. 306

[See this case given on page 282, *ante*] [21]

21—"The question is simply whether the York Mfg. Co. has a right under its conditional sale of the machinery to the bankrupt corporation to take the machinery out of the premises where it was placed as against all except judgment, or other creditors, by some specific lien. There are no judgment creditors in the case, and no attachment has been levied, and the question is simply whether the adjudication in bankruptcy is equivalent to a judgment or an attachment on the property, such as to prevent the York Mfg. Co. from asserting its right to remove the machinery by virtue of reservation of the title contained in its contract. * * *

"We come, then, to the question whether an adjudication in bankruptcy was equivalent to a judgment, attachment, or other specific lien upon the machinery. * * * We are of opinion that it did not operate as a lien upon the machinery, as against the York Mfg. Co., the vendor thereof. Under the provi-

3. DISSOLUTION OF LIENS

HENDERSON v. MAYER

225 U. S. 631, 56 L. ed. 1233, 32 Sup. Ct. 699

(United States Supreme Court, June 7, 1912)

Samuel Mayer owned a plantation in Dooley county, Georgia, which he rented to Joseph Burns for one year. The rent not having been paid at maturity, Mayer, on November 13, 1908, made an affidavit in conformity with the statute, and a justice of the peace thereupon issued a distress warrant, which, on the same day, was levied upon the cotton, corn, and other products of the place. The crops found on the premises being, apparently, insufficient to pay what was due, the sheriff, at the same time, levied upon other property by virtue of § 2795 of the Code of Georgia, which declares that "landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes, * * * and shall also have a general lien on the property of the debtor liable to levy and sale, and such general lien shall date from the time of the levy of a distress warrant to enforce the same."

Three days after the levy a petition in bankruptcy was filed against Burns, the tenant, who was subsequently adjudged a bankrupt. The trustee, when elected, obtained possession of all the property seized by the sheriff, and subsequently sold it in the due administration of the estate. The proceeds of the cotton and corn were paid over to Mayer, it being conceded that the

sions of the bankrupt act, the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belongs to the bankrupt at the time when the trustee's title accrued." York Manufacturing Co. v. Cassel, 201 U. S. 344, 350. See 7 Mich. L. Rev. 474, where it is suggested that the matter considered in the case quoted above should be considered by Congress.

In 1910, § 47a (2) of the bankruptcy act was amended by adding the following: "and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." See 24 Harv. L. Rev. 620; In re White's Express Co., 215 Fed. 894; Holt v. Henley, 232 U. S. 637.

landlord's special lien on the crops had not been affected by the bankruptcy proceedings.

Mayer also claimed that, by virtue of his general lien, he was entitled to have the balance of the rent paid out of the proceeds arising from the sale of the other property levied on, and filed his intervention to secure such an order. The trustee's objection was sustained by the referee on the ground that the landlord's general lien was discharged because it had been "obtained by legal proceedings" or levy made three days before the filing of the petition in bankruptcy. His ruling was reversed by the District Court (175 Fed. 633). That judgment was affirmed by the Circuit Court of Appeals without opinion. The case was then brought here by writ of *certiorari*, granted at the instance of the trustee, who claims that under the Georgia Code the landlord had no lien on the property prior to the levy of the distress warrant, and that whatever right had been acquired by that seizure was discharged by § 67*f*, which declares that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be null and void in case he is adjudged a bankrupt."

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court:

The provisions of the bankruptcy act, preventing an insolvent from giving or the creditor from securing preferences for pre-existing debts, apply not only to mortgages and transfers voluntarily made by the debtor, but also to those preferences which are obtained through legal proceedings, whether the lien dates from the entry of the judgment, from the attachment before judgment, or, as in some states, from the levy of execution after judgment. But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent.

Liens in favor of laborers, mechanics, and contractors are of this character; and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been "obtained through legal proceedings," even when it is necessary to enforce them by some form of legal proceeding. The statutes of

the various states differ as to the time when such liens attach, and also as to the property they cover. They may bind only what the plaintiff has improved or constructed; or they may extend to all the chattels of the debtor, or "all the property involved in the business." Re Bennett, 82 C. C. A. 531, 153 Fed. 673.

In some cases the lien dates from commencement of the work, or from the completion of the contract. In others, prior to levy they are referred to as being dormant or inchoate liens, or as "a right to a lien." Re Bennett, 82 C. C. A. 531, 153 Fed. 677; Re Laird, 48 C. C. A. 538, 109 Fed. 554.[22] But the courts, dealing specially with bankruptcy matters, have almost uniformly held that these statutory preferences are not obtained through legal proceedings, and therefore are not defeated by § 67*f*, even where the registration, foreclosure, or levy necessary to their completion or enforcement was within four months of the filing of the petition in bankruptcy.

Similar rulings have been made where the landlord has only a common-law right of distress. Re West Side Paper Co., 89 C. C. A. 110, 162 Fed. 110, 15 Ann. Cas. 384. This is often referred to as a lien, but it is "only in the nature of security." 3 Bl. Com. 18. The pledge, or quasi pledge, which the landlord is said to have, is, at most, only a power to seize chattels found on the rented premises. These he could take into possession and hold until the rent was paid. Doe ex dem. Gladney v. Deavors, 11 Ga. 84. But before the distraint the landlord at common law has "no lien on any particular portion of the goods, and is only an ordinary creditor, except that he has the right of distress by reason of which he may place himself in a better position." Sutton v. Rees, 9 Jur. N. S. 456, 1 New Reports, 464, 8 L. T. N. S. 343, 11 Week. Rep. 413. A right fully as great is created by the Georgia statute here in question. For while giving the owners of agricultural lands a special lien on the crops, there was no intention to deprive the proprietor of urban and other real estate of the lien for rent which there, as in other states, is treated as an incident growing out of the relation of landlord and tenant.

The Code (§ 2787) expressly "establishes liens in favor of landlords." It (§ 3124) gives them "power to distrain for rent

22—For example see In re Roeber, 121 Fed. 449; Kane Co. v. Kinney, 174 N. Y. 69; In re Grissler, 136 Fed. 754, all with reference to liens for material and labor under New York law. *Cf.* Ryerson & Son v. Smith, 152 Ill. 641.

as soon as the same is due." It declares (§ 2795) that landlords "shall have a general lien on the property of the tenant, liable to levy and sale * * * which dates from the levy of the distress warrant to enforce the same." It is true that prior to levy it covers no specific property, and attaches only to what is seized under the distress warrant issued to *enforce* the lien given by statute. But in this respect it is the full equivalent of a common-law distress—the lien of which is held not to be discharged by § 67*f*. Re West Side Paper Co., *supra;* Austin v. O'Reilly, 2 Woods, 670, Fed. Cas. No. 665.

The fact that the warrant could be levied upon property which had never been on the rented premises does not change the nature of the landlord's right, though it may increase the extent of his security. The statutory restrictions as to date, rank, and priority may be important in a controversy with other lienholders, but was wholly immaterial in this contest between the landlord and trustee, where the latter was only representing general creditors. As against them the landlord had, from the beginning of the tenancy, the right to a statutory lien, which had completely ripened and attached before the filing of the petition in bankruptcy. The priority arising from the levy of the distress warrant was not secured because Mayer had been first in a race of diligence, but was given by law because of the nature of the claim and the relation between himself as landlord and Burns as tenant. In issuing the distress warrant the justice acted ministerially. Savage v. Oliver, 110 Ga. 638, 36 S. E. 54. The sheriff was not required to return it to any court, and no judicial hearing or action was necessary to authorize him to sell for the purpose of realizing funds with which to pay the rent. Such a lien was not created by a judgment nor "obtained through legal proceedings."

Decisions to the same effect were made under the bankruptcy act of 1867 (14 Stat. at L. 522, § 14, c. 176), which dissolved attachments or *mesne* process within four months prior to the filing of the petition. In Austin v. O'Reilly, *supra,* decided in 1875, it appeared that in Mississippi the landlord had no lien, but, as in Georgia, was authorized to seize (but by attachment) the tenant's goods wherever found. Justice Bradley, presiding at circuit, said that the landlord's right to a distress at common law was not a strict lien, but "being commonly called a lien, and being a peculiar right in the nature of a lien, * * * the Supreme Court of the United States, and most of the District and

Circuit Courts, have regarded it as fairly to be classed as a lien, within the true intent and meaning of the bankrupt act," and that the statutory attachment being in the nature of a common-law distress was not nullified or discharged by the bankruptcy proceedings.

There is nothing in the act of 1898 opposed to this conclusion. On the contrary, its general provisions indicate a purpose to continue the same policy, and an intent, as against general creditors, to preserve rights like those given by the Georgia statute to landlords, even though the lien was enforced and attached by levy of a distress warrant within four months of the filing of the petition in bankruptcy.[23]

Affirmed.

POPE v. TITLE GUARANTY & SURETY CO.

152 Wis. 611, 140 N. W. 348

(Supreme Court of Wisconsin. March 19, 1913)

BARNES, J. On July 8, 1911, the plaintiff commenced an action against the National Boat & Engine Company and attached its property. On July 14th the attachment was released on a bond conditioned to pay on demand the amount of any judgment which the plaintiff might recover. This bond was signed as surety by the Title Guaranty & Surety Company, the defendant in the present action. Judgment by default was taken in the original action on August 3, 1911. On September 5, 1911, the defendant therein was adjudged a bankrupt. This action is brought against the surety to recover the amount of the judgment secured by plaintiff against the bankrupt.

The substantial question in the case is whether the adjudication in bankruptcy destroyed the judgment and released the surety from liability. The answer to this question depends upon the construction that should be placed on § 67, subd. "f," of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564, 565 [U. S. Comp. St. 1901, p. 3449]; 1 Fed. Stat. Ann. 693). This section reads as follows: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the

23—See Hulbutt v. Brown, 72 N. H. 235; Doe v. Childress, 21 Wall. 642; Metcalf v. Barker, 187 U. S. 165.

filing of a petition in bankruptcy against him,[24] shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

If this statute is to be read literally, and it is held that the judgment has been wiped out of existence by the proceedings in bankruptcy, then we think it would have to be conceded that the bondsman is absolved from liability. Its undertaking is to pay a valid judgment, not one that is void and does not in fact exist. If the statute only destroys any lien created by the judgment, and simply aims to prevent the judgment creditor from obtaining any preference or advantage over the general creditors of the bankrupt by virtue of his judgment, then the adjudication in bankruptcy did not discharge the surety.

There are a number of decisions wherein the courts, following the language of the statute, have said that the effect of an adjudication in bankruptcy, within four months after the recovery of a judgment against the bankrupt, is to render the judgment void. In re Richards (D. C.) 95 Fed. 258, and In re Beals (D. C.) 116 Fed. 530, are typical of the class of cases referred to. In nearly all of them the same result would have been reached had the courts held that it was the liens created by the judgments that had been destroyed, and not the judgments themselves. The point presently under discussion was neither involved nor considered in the great majority of these cases, which are relied upon by the appellant, and therefore they cannot be accorded any great weight in deciding the question before us.

Congress gets its power to legislate on the subject of bankruptcy from § 8 of article 1 of the Constitution, which empowers it to pass "uniform laws on the subject of bankruptcies throughout the United States." It has been held, correctly, we think, that the "*subject of bankruptcies* includes the distribution of the property of the fraudulent or insolvent debtor among his

24—This language does not apply to involuntary bankruptcy alone. In re Blair, 108 Fed. 529, where In re De Lue, 91 Fed. 510, to the contrary, is declared to be erroneous.

creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends." Silverman's Case, 2 Abb. U. S. 243, 245, Fed. Cas. No. 12,855.

The present bankruptcy act aims to secure an equal and equitable distribution of the debtor's property among his creditors, and to promote that end has in effect provided that no preference or advantage may be obtained by one creditor over another by virtue of any attachment, garnishment, or levy made within four months of the adjudication in bankruptcy. This is as far as it was necessary for Congress to go to attain the ends aimed at. It may well be doubted whether Congress could go to the extent claimed. A creditor has a right to sue his debtor. State Courts have jurisdiction of the persons of the parties, if they live therein, and of the subject-matter of an action on contract brought to collect a debt. A judgment in such an action is valid when rendered. Congress can say to the creditor, "You may not obtain any special advantage by virtue of the judgment over other creditors in the distribution of the bankrupt's estate," and further that the creditor may be discharged from his debts, and that the judgment cannot be enforced against him. But can it say, for instance, that the judgment is not evidence of the amount of the indebtedness due from the bankrupt to the judgment creditor? Or that the judgment is unenforceable if the bankrupt is not entitled to a discharge under the law? Or that the judgment creditor may not proceed against a surety whose liability depends on the validity of the judgment, where such action in no way affects the other creditors of the bankrupt? Whatever may be the correct answers to these questions, they pointedly suggest the improbability of congressional intent to legislate to the extent claimed, and to the extent to which a literal reading of the statute would lead. It was wholly unnecessary to do so. The judgment of the Wisconsin court was valid when it was rendered, and the liability of the surety became fixed at such time. If the creditor had any real estate to which the lien of the judgment attached, such lien was destroyed by the adjudication in bankruptcy, because such destruction was necessary to preserve the property for all of the creditors. The same would be true of the attachment lien if that had continued. If the bankrupt was discharged, the judgment could not be enforced against him, because Congress had the right to absolve the bank-

rupt from his debts after his property or the proceeds of it were distributed among the creditors. It was wholly unnecessary to discharge the surety from the payment of its obligation in order to protect either the debtor or the creditors.

Aside from what has been said, there are a number of considerations which warrant the conclusion that the statute aimed at the lien created by a judgment rather than the judgment itself.

The words "all judgments," found in § 67*f* heretofore quoted, are found in the act under the subtitle "liens," and are found in connection with the words "levies, attachments, and other liens," indicating that it was the lien, rather than the judgment itself, that Congress intended to reach.

§ 63*a* of the bankruptcy act provides that judgments are provable as claims against the estate of the bankrupt, without regard to the time of their rendition. Congress certainly did not intend that a void judgment could be proved as a claim in the bankruptcy proceeding.

Subsection 5 of § 63*a* provides that judgments rendered after the filing of the petition in bankruptcy, and before the consideration of the application for the discharge, may be proved against the estate of the bankrupt, less costs incurred and interest accrued after the time of filing the petition.

Under § 17, judgments in actions for frauds or obtaining property under false pretenses or for willful and malicious injury to the person or property of another are not affected at all by a discharge in bankruptcy. Such a judgment is perfectly valid if entered the day before filing the petition in bankruptcy. If § 67 is to receive a literal construction, it is obviously inconsistent with § 17, because the words "all judgments" would include one rendered in any of the classes of cases provided for in said § 17.

§ 905, Rev. St. (U. S. Comp. St. 1901, p. 677), provides that the records and judicial proceedings of the courts of any state or territory, when duly authenticated as therein specified, shall have such faith and credit given them in every court in the United States as they have by law or usage in the courts of the state from which they are taken. This statute, in substantially its present form, was enacted in 1790; and it is hardly supposable that Congress intended to amend or partially repeal it by § 67*f* of the bankruptcy act.

Again, if the words "all judgments" are to be literally construed, they must be held to include judgments rendered in

courts of foreign countries, regardless of treaty stipulations, and perhaps even judgments in the court in which the bankruptcy proceedings are being carried on. We hold that the words "all judgments" are qualified and defined by their context, and that it is the lien or preference created by the judgment that is void. This conclusion is not without support in the authorities. Doyle v. Heath, 22 R. I. 213, 47 Atl. 213, is a well-considered case directly in point. The case of In re Richards, heretofore cited, was appealed, and the Circuit Court of Appeals, in affirming the judgment, was careful to say that it was the lien of the judgment that § 67*f* declared to be void. 96 Fed. 935, 37 C. C. A. 634. In re Pease, 4 Am. Bankr. Rep. 547, is likewise in point. In this case it is said that § 67*f* was incorporated in the bankruptcy act by the conference committee; and the following quotation is made from the report of the House conferees as found in the Congressional Record, Second Session, Thirty-fifth Congress, p. 7205: "By an addition to § 67, which relates to liens, the bill has been materially strengthened. * * * In effect, liens of any description obtained upon the property of a bankrupt within four months of the adjudication are made null and void, except where given for a new and fair consideration to a person who has no notice of the insolvency or reasonable cause for inquiry." This quotation would indicate that the authors of the section had in mind the matter of declaring liens void, rather than judgments. Other cases holding that judgments recovered within four months of the adjudication in bankruptcy are not void are In re Kavanaugh (D. C.), 99 Fed. 928; In re Beaver Coal Co. (D. C.), 110 Fed. 630; In re Blair (D. C.), 108 Fed. 529. Moreover, the federal Supreme Court has held that § 67*f* should not receive a literal construction, and in substance and effect has said that it is the lien of the judgment, and not the judgment itself, that is destroyed. Metcalf v. Barker, 187 U. S. 165, 174, 23 Sup. Ct. 67, 47 L. ed. 122. Our own court held in Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417, that filing a petition in bankruptcy does not prevent a party from maintaining and prosecuting an action against the bankrupt in the state courts, and that the creditor can only defeat such an action if meritorious by pleading his discharge in the bankruptcy proceedings.

Holding, as we do, that the judgment was not void, we see no good reason why the surety should escape liability. The contingency has arisen under which it agreed to respond in damages.

The mere fact that plaintiff, by reason of the bankruptcy proceedings, cannot enforce his judgment against the bankrupt does not extend immunity to the surety. It agreed to pay when judgment was rendered against its principal. That event having taken place, the surety should respond. Wolf v. Stix, 99 U. S. 1, 8, 25 L. ed. 309. Indeed, many of the cases recognize the right of the creditor to take a judgment, coupled with a perpetual stay of execution, in order that the event may take place on which the liability of the surety is made to depend; and this court recognized the existence and the propriety of such a rule in Whereatt v. Ellis, 103 Wis. 352, 79 N. W. 416, 74 Am. St. Rep. 865. The decision in that case is conclusive as to the liability of the surety here. There is no difference in principle between the two cases.

Some cases are cited which deal with the effect of a discharge in the bankruptcy proceedings. No such question is in the case. No discharge was either pleaded or proved; and we infer from the record that the bankruptcy proceedings had not been wound up when this case was tried.

Judgment affirmed.

CLARKE v. LARREMORE

188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. 363

(United States Supreme Court. February 23, 1903)

On January 23, 1899, the petitioner, the owner of certain notes of Raymond W. Kenney, commenced an action thereon in the Supreme Court of the state of New York. On March 6, 1899, he recovered judgment for the sum of $20,906.66. An execution, issued thereon, was by the sheriff of the county of New York levied upon a stock of goods and fixtures belonging to Kenney. A sheriff's sale thereof, had on March 15, 1899, realized $12,451.09. Shortly after the levy of the execution Leon Abbett sued out in the same court a writ of attachment against the property of Kenney, and caused it to be levied upon the same stock and fixtures. Immediately thereafter, claiming that the debt in judgment was a fraudulent one, he commenced in aid of his attachment an injunction suit to prevent the further enforcement of the judgment, and obtained a temporary order restraining the sheriff from paying petitioner the money received upon the execution sale. Upon a hearing the Supreme Court

decided that the debt was just and honest, and on April 13, 1899, set aside the restraining order. On the same day, and before the sheriff had returned the execution or paid the money collected on it, a petition in involuntary bankruptcy against Kenney was filed in the United States District Court for the southern district of New York, and an order made by the district judge restraining the sheriff from paying the money to Clarke, the execution creditor. 95 Fed. 427. Kenney was thereafter adjudged a bankrupt, and on November 25, 1899, the plaintiff having been appointed trustee in bankruptcy, the district judge entered a further order directing the sheriff to pay the money to the trustee. 97 Fed. 555. On review, the United States Circuit Court of Appeals for the second circuit affirmed these orders of the district judge (45 C. C. A. 113, 105 Fed. 897), and thereupon a *certiorari* was granted by this court. 180 U. S. 640, 45 L. ed. 711, 21 Sup. Ct. Rep. 927.

* * *

Mr. Justice BREWER delivered the opinion of the court:

The contention of the petitioner is that—

"The sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt, at the time of the adjudication, and the trustee, therefore, has no title to the same."

This contention cannot be sustained. The judgment in favor of petitioner against Kenney was not like that in Metcalf Bros. v. Barker, 187 U. S. 165, 23 Sup. Ct. Rep. 67, one giving effect to a lien theretofore existing, but one which, with the levy of an execution issued thereon, created the lien; and as judgment, execution, and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy. This nullity and invalidity relate back to the time of the entry of the judgment, and affect that and all subsequent proceedings. The language of the statute [67*f*] is not "when" but "in case he is adjudged a bankrupt," and the lien obtained through these legal proceedings was by the adjudication rendered null and void from its inception. Further, the statute provides that "the property affected by"—not the property subject to—the lien is wholly discharged and released therefrom. It is true that the stock and fixtures, the property originally belonging to

the bankrupt, had been sold, but having, so far as the record shows, passed to a "*bona fide* purchaser for value," it remained by virtue of the last clause of the section the property of the purchaser, unaffected by the bankruptcy proceedings. But the money received by the sheriff took the place of that property.

It is said that that money was not the property of the bankrupt, but of the creditor in the execution. Doubtless as between the judgment creditor and debtor, and while the execution remained in force, the money could not be considered the property of the debtor, and could not be appropriated to the payment of his debts as against the rights of the judgment creditor, but it had not become the property absolutely of the creditor. The writ of execution had not been fully executed. Its command to the sheriff was to seize the property of the judgment debtor, sell it, and pay the proceeds over to the creditor. The time within which that was to be done had not elapsed, and the execution was still in his hands, not fully executed. The rights of the creditor were still subject to interception. Suppose, for instance, there being no bankruptcy proceedings, the judgment had been reversed by an appellate court and the mandate of reversal filed in the trial court; could it for a moment be claimed that, notwithstanding the reversal of the judgment, the money in the hands of the sheriff belonged to the judgment creditor, and could be recovered by him, or that it was the duty of the sheriff to pay it to him? The purchaser at the sheriff's sale might keep possession of the property which he had purchased, but the money received as the proceeds of such sale would undoubtedly belong and be paid over to the judgment debtor. The bankruptcy proceedings operated in the same way. They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy, and sale, rested. The duty of the sheriff to pay the money over to the judgment creditor was gone and that money became the property of the bankrupt, and was subject to the control of his representative in bankruptcy.

It was held in Turner v. Fendall, 1 Cranch, 116, 2 L. ed. 53, that money collected by a sheriff on an execution could not be levied upon under execution placed in his hands against the judgment creditor, and that the latter could maintain an action against the sheriff for a failure to pay the money thus collected. A similar ruling was made in New York (Baker v. Kenworthy, 41 N. Y. 215), in which it appeared that a sheriff had collected

money on an execution in favor of one Brooks; that he returned the execution without paying the money to Brooks, but, on the contrary, levied upon it under an execution against Brooks, and it was held that such levy did not release him from liability to Brooks. It was said in the opinion (p. 216):

"The money paid into the hands of the sheriff on the execution in favor of Brooks did not become the property of Brooks until it had been paid over to him. Until that was done, the sheriff could not levy upon it by virtue of the execution against Brooks then in his hands."

The rule in that state in respect to a levy upon money in the hands of a sheriff may have been changed,—at least, so far as an attachment is concerned. See Wehle v. Conner, 83 N. Y. 231.

In Nelson v. Kerr, 59 N. Y. 224, it is said: "The money collected by the sheriff belongs to the plaintiff." But in that case the execution had been returned, and yet the officer had not paid the money to the execution creditor. See also Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516.

In none of those cases had anything been done to affect the validity or force of the writ of execution. Whatever was done was done under a writ whose validity and potency were unchallenged and undisturbed; while here, before the writ of execution had been fully executed, its power was taken away. Its command had ceased to be obligatory upon the sheriff, and the execution creditor had no right to insist that the sheriff should further execute its commands.

A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution, and that which was done under them, as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations. It is enough now to hold that the bankruptcy proceedings seized upon the writ of execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor.

The judgment of the Court of Appeals is affirmed.

Mr. Justice WHITE and Mr. Justice PECKHAM dissented.

In re RESNEK

167 Fed. 574

(District Court, E. D. Pennsylvania. February 9, 1909)

HOLLAND, District Judge. In this case the judgment had been entered in the Court of Common Pleas of Northampton county, the levy and sale made, and the money paid over to Albert H. Resnek on the 9th day of December, 1907, within four months of the filing of the petition in bankruptcy against the alleged bankrupts, which took place on the 16th day of March, 1908, and the adjudication was entered April 16, 1908. Upon the presentation of a petition, the referee summarily directed Albert H. Resnek to pay over to the trustee in bankruptcy the net proceeds received from the sheriff on the execution, to which order Resnek excepted, and the question is certified to this court for determination as to whether the referee, under the circumstances, had jurisdiction to make this summary order.

Where, within four months before the filing of a petition in bankruptcy against an insolvent debtor, an execution has been issued and levy and sale made and the proceeds paid over to the judgment creditor before the filing of the petition, the case does not fall within the provisions of § 67*f* of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), and the lien created by the judgment and levy is not rendered void by the adjudication. The remedy, if any, the trustee has against the creditor, is under the provisions of §§ 60*a* and 60*b* of the bankrupt act in a plenary action, where it will be necessary to allege and show that the creditor had reasonable cause to believe that the bankrupt, by suffering judgment to be taken against him, intended to give a preference. In re Blair (D. C.), 102 Fed. 987; In re Bailey (D. C.), 144 Fed. 214. And this is true, even though the proceeds of the execution are insufficient to satisfy the claim of the judgment creditor. In re Knickerbocker (D. C.), 121 Fed. 1004.

It follows, therefore, that the order of the referee must be reversed. It is so ordered.

FIRST NAT. BANK v. STAAKE

202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. 580

(United States Supreme Court. April 30, 1906)

This writ of *certiorari* was allowed to review an order of the Circuit Court of Appeals, affirming a decree of the District Court in favor of Staake, as trustee in bankruptcy of the estate of Chester R. Baird, bankrupt, subrogating him to the rights of certain creditors, and authorizing him to enforce their attachment liens with like force and effect as the attaching creditors—one of which was the First National Bank of Baltimore—might have done had not the bankruptcy proceedings intervened.

The facts of the case are substantially as follows: Chester R. Baird, doing business under the name of C. R. Baird & Company, and owning certain real estate in Virginia known as the West End Furnace Company, sold the same, December 7, 1899, to the Roanoke Furnace Company, subject to certain encumbrances, executed a contract in writing, and received from the furnace company the entire consideration, namely, $500,000, in the capital stock of the furnace company. Under this contract of sale the furnace company took immediate possession, but no deed to the company was made until November 5, 1900, when a deed was executed and recorded.

Meantime, however, and on October 26, 1900, nine different attachments, among them one by the petitioning bank, were sued out of the hustings court for the city of Roanoke, amounting to over $40,000, against Baird as a nonresident, and were levied upon the furnace property. Under the provisions of the law of Virginia the attachments, having been levied before the deed of the furnace property had been executed and recorded, the attaching creditors acquired, as against Baird and the furnace company, a lien on the properties attached.

Within four months after the levy of the attachments, namely, December 24, 1900, Baird was adjudicated a bankrupt in the District Court for the eastern district of Pennsylvania, and on January 2, 1901, the District Court for the western district of Virginia assumed ancillary jurisdiction of such property as was located in Virginia. On December 29, 1900, the Roanoke Furnace Company was also adjudicated a bankrupt. On March 26, 1901, Staake was appointed trustee of Baird's estate, and

on June 29, 1901, John M. N. Shimer was appointed trustee of the Roanoke Furnace Company.

It was further agreed that the deed of November 5, 1900, from Baird to the Roanoke Furnace Company, was a valid conveyance to a purchaser in good faith for a then fair consideration, and was not affected by the bankruptcy proceedings.

The proceedings in question here were instituted by a petition filed by Staake, entitled both in the cases of Chester R. Baird and the Roanoke Furnace Company, averring that under the laws of Virginia the rights of the attaching creditors were superior to those of the furnace company, and that as to them the property attached was the property of Baird; but that, by reason of his insolvency and of the fact that these attachments had been levied within four months preceding the filing of the petition in bankruptcy, such attachments were null and void, unless the court should order them preserved for the benefit of the estate. He therefore prayed that they be decreed null and void as regards plaintiffs, but that they be preserved for the benefit of petitioner.

The bank demurred to this petition, and also answered, denying that its attachment was null and void, and also denying the right of the court to enter an order preserving the attachment for the benefit of the petitioner; and alleging that respondent is entitled to the benefit of the attachment, said property when sold by an interlocutory order having realized enough to pay said attachment, as well as all prior liens.

Shimer, trustee for the Roanoke Furnace Company, also answered, praying that, if the attachment be continued for the trustee of Baird, the petitioner should be required to abate a large claim which he filed against the estate of the Roanoke company, by the amount of said attachments.

Upon a hearing before the District Court, that court overruled the demurrer to Staake's petition, and authorized him to enforce the attachment liens for the benefit of the estate. 126 Fed. 845. The Court of Appeals affirmed this action (66 C. C. A. 547, 133 Fed. 717), and the bank petitioned this court for a writ of *certiorari*, which was granted.

Mr. Justice BROWN, after making the foregoing statement, delivered the opinion of the court:

At the time these attachments were levied, the title to the property in question stood in the name of Baird, and the attach-

ing creditors, by their levies, secured a preferential lien upon the property, not only as against Baird, but also as against the furnace company, which received a deed to the property November 5, 1900, after the attachments had been levied. These attachments, however, were annulled by the filing of a petition in bankruptcy against Baird within four months after the attachments were levied, and if the case stood upon this fact alone there could be no doubt that the property would pass to the trustee of the furnace company, discharged of the lien of the attachments. We are not concerned here with any conflicting rights of the two trustees, Staake and Shimer, since they were both appointed receivers of the Roanoke Furnace Company, and the only claim made by Shimer now is that, if the attachments be continued, the petitioner Staake be required to abate his claim against the estate of the furnace company by the amount of these attachments. It is therefore unnecessary to consider whether, if the attachments were annulled, the property would pass unencumbered to the trustee of the furnace company, since, as stated by the district judge, the demurrer to the petition is intended merely to raise the question whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

This depends upon the peculiar terms of § 67 of the bankrupt act, which provides as follows:

"§ 67*f*. That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, *unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate;* and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value

who shall have acquired the same without notice or reasonable cause for inquiry."

§ 67*c*, which also treats of liens created by attachments on *mesne* process, and provides for their dissolution, in the last clause declares that—"if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien, and empowered to perfect and enforce the same in his name as trustee, with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

This section (67*f*) makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors; that is, "for the benefit of the estate," —in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors.

The first provision contemplates the attachment of property to which the bankrupt has the complete, legal, and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since, under the first clause, the entire value of the property attached passes to the trustee, free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dis-

solved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy.

In the present case Baird had contracted to convey the property to the Roanoke Furnace Company, possession had been taken, and the consideration paid, but the deed was not actually executed and recorded until after the attachment had been levied. Hence, under the Virginia statute, the validity of which is not questioned, the lien of the attachment took precedence of the deed, and would have remained a prior lien, had it not been for the institution of the bankruptcy proceedings within four months. This dissolved the attachment, and, had the case rested here, the property would have apparently passed to the furnace company, or to its trustee in bankruptcy, Shimer; but at this point the court, under the second proviso of § 67*f*, interposed and recognized the lien of the attachment; not, however solely for the benefit of the attaching creditors, but for the benefit of Baird's estate. Shimer made no objection, and the court declined to express an opinion as to his rights.

This is one of the very contingencies provided for by the second clause of the section, which apparently vests in the court a certain discretion with regard to the preservation of the right acquired under the attachment or other lien. In this case the court recognized the validity of the lien, the trustee of the furnace company making no objection to this; but the attaching creditors insist that, as the lien was acquired for their own benefit, they should not be required to share with the general creditors of Baird's estate.

Their argument is based upon the theory that the second clause was not intended to apply to liens acquired upon the estate of third parties, but to property which would have passed to Baird's trustee had the attachment not been levied. In other words, that the bankruptcy court has nothing to do with the property, since it really did not belong to the bankrupt, and would have passed to his vendee if the attachments had not been levied upon it. Indeed, the opinion especially finds that "had valid attachments not been levied, the property would have passed to the trustee of the Roanoke Furnace Company."

To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It

took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition, but at the same time preserved to the general body of creditors, as against third parties (such as purchasers under an unrecorded deed), such liens as attaching creditors had secured upon property which would have passed to the subsequent purchaser in case the attachment had not been levied. It is true that the attaching creditors are thereby deprived of the fruits of their diligence, but the same thing would have happened had the attachment been levied upon property to which the bankrupt had the whole and undisputed title, or of which he had made a fraudulent conveyance. As remarked by the district judge, "In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the *pro rata* benefit of all the creditors." [126 Fed. 847.]

§ 67*f* is merely carrying out the general purposes of the act, of securing to the creditors the entire property of the bankrupt, reckoning as part of such property liens obtained by attaching creditors against real estate which had been transferred to another, though no deed had been actually executed and recorded.

The argument that § 67*f* in question here refers only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, we think is unsound, since that contingency is amply provided for by the prior clause of the section annuling all such liens and providing that property affected thereby shall pass to the trustee as a part of the estate. Under the argument of the attaching creditors in this case, the subsequent clause would be entirely unnecessary. This clause evidently contemplates that attaching creditors may acquire liens upon property which would not pass to the bankrupt if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken, doubtless this property would have been sold for the benefit of the attaching creditors.

The general rule relied upon by the bank in this case, that the words "property of the bankrupt" mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has only a bare legal title, is perhaps justified by our decision in Hewit v. Berlin Mach. Works, 194 U. S.

296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690. But the extent to which the bankruptcy court shall recognize the rights obtained by creditors upon property attached as the property of the bankrupt, though in fact such property had been conveyed by an unrecorded contract, is a matter solely within the discretion of Congress. The liens acquired in this case were liens upon property which, as to attaching creditors, was the property of the bankrupt, and Congress may lawfully insist that it shall be reckoned as a part of his estate, and pass to the trustee. As remarked by the Court of Appeals: "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors." [66 C. C. A. 550, 133 Fed. 720.]

If the interest of Baird in this property were sold solely for the benefit of the attaching creditors, it would obviously result in a preference to those creditors over the general creditors of his estate, and in fraud of the bankruptcy act, which is designed to secure equality among all creditors.

The judgment of the Court of Appeals is affirmed.[25]

25—Mr. Justice HARLAN, Mr. Justice WHITE, and Mr. Justice PECKHAM dissented.

—Construction of 67c and 67f. —"§ 67c declares that all liens obtained by suit in law or in equity, including an attachment upon mesne process or a judgment by confession begun within four months before the filing of the petition in bankruptcy, shall be dissolved by the adjudication if it appear that said lien was obtained or permitted while the debtor was insolvent, and that its existence and enforcement will work a preference. This clause, it would seem, recognizes a preference obtainable through an attachment, acquired upon mesne process pursuant to a suit or proceeding at law or in equity, the condition being that the attachment shall have been made while the debtor was insolvent, and its existence and enforcement will so operate; that is, as a preference.

"§ 67f provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of the petition in bankruptcy, shall be null and void in case he is adjudged a bankrupt, and that the property affected thereby shall be wholly discharged and released from the same. It has been held and determined that subdivision 'c' is repugnant to the provisions of subdivision 'f,' on the same subject, and that the latter provisions are controlling. In re Richards, 96 Fed. 933, 935, 37 C. C. A. 634; Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182. We quote from the opinion in the former case:

" 'These two subdivisions, "c" and "f," in our judgment, are plainly antagonistic and irreconcilable. The former saves a lien obtained through legal proceedings begun within four months unless it was obtained and

4. MUTUAL DEBTS AND CREDITS

LIBBY v. HOPKINS

104 U. S. 303, 26 L. ed. 769

(United States Supreme Court. October term, 1881)

Error to the Supreme Court of the state of Ohio.

The suit was brought in the Superior Court of Cincinnati, by A. T. Stewart & Co., of which firm the plaintiffs in error are the survivors, against Lewis C. Hopkins and wife, and Isaac M. Jordan, trustee in bankruptcy of Hopkins.

It appears from the record that A. T. Stewart & Co., merchants, of the city of New York, loaned, June 6, 1866, Hopkins, a merchant of Cincinnati, Ohio, $100,000, and took his promissory note of that date therefor, payable on demand with interest from date, to secure the payment of which he executed and delivered to them several mortgages on real estate in Cincinnati and its vicinity. Both before and after that date he bought of

permitted while the debtor was insolvent, or the creditor had reasonable cause to believe such insolvency, or the lien was sought and permitted in fraud of the provisions of the act. The question of the pecuniary condition of the debtor and knowledge upon the part of the creditor are influential in determining the validity of the lien so obtained. But subdivision "f" is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is insolvent within four months before the filing of the petition.'

"See, also, Cook v. Robinson *et al.*, 194 Fed. 785, 114 C. C. A.—, No. 2,013, just decided.

"Notwithstanding the repugnancy of subdivision 'c' to subdivision 'f,' and that the provisions of the latter are controlling, those of the former still remain for the purpose of interpretation, as the intendment of the act must be gathered from a reading of all its provisions as enacted in *pari materia*. So reading the provisions as they relate to a preference, we find that a preference may not only consist in the bankrupt's procuring or suffering a judgment to be entered against him or making a transfer of his property within four months of the filing of the petition in bankruptcy, but also in the creation of a lien by way of attachment, or the confession of a judgment within four months of the filing of the petition, the existence and enforcement of which will work a preference." Folger v. Putnam, 194 Fed. 793.

them large quantities of goods, and as a matter of convenience kept with them two accounts,—one a cash and the other a merchandise account. They were his bankers. All his remittances were sent to them and credited to him in the cash account. By drafts thereon he paid his debts for merchandise to them and other New York merchants, and in order to replenish it he borrowed the $100,000 above mentioned, and it was carried to his credit in that account. On May 4, 1867, he paid on his note $25,000. On Nov. 12, 1867, he remitted to Stewart & Co., $10,000, on Dec. 27, 1867, $17,000, on the 28th of the same month, $10,000, and on the 30th, $48,025. He directed these remittances to be applied to the payment of his note and to be credited thereon. It is now no longer disputed that the first three of these remittances were so applied. The last two, with the interest thereon, constitute the sum now in controversy.

On Jan. 1, 1868, Hopkins suspended business, insolvent. At that time he owed A. T. Stewart & Co., $231,515 on account, and unsecured. His liabilities to others amounted to more than $500,000. A petition in bankruptcy was filed against him February 29. He was adjudicated a bankrupt March 30. On April 30 Jordan was appointed trustee.

As to the foregoing facts there is no dispute.

In August, 1868, on what day the record does not show, Stewart & Co. commenced this suit for the foreclosure of the mortgages, claiming as due the full amount of the note, less the payment of $25,000.

The answer, besides other defenses not pertinent to any contention now raised, averred that Hopkins had paid on the note, not only the said sum of $25,000, but also the remittances above mentioned, making the total amount paid thereon $110,025; and, after alleging that said payments were made in fraud of the bankrupt act, demanded, by way of counterclaim, a judgment against Stewart & Co. therefor.

The reply admitted that Hopkins requested Stewart & Co. to credit the remittances on his mortgage debt, and averred that they were held subject to his order, and continued to be so held, up to the time when the rights of Jordan, trustee, attached, subject to such law of set-off as is provided in the bankrupt act. It nowhere appeared in the pleadings that Hopkins was indebted to the plaintiffs on any unsecured claim, or in any other way, except upon the note for $100,000. No unsecured debt of Hopkins was pleaded as a set-off or otherwise.

The Superior Court found that the mortgages were valid, and the first lien on the premises therein described, and that there was due thereon, including interest, the sum of $75,957.06. It rendered a final decree that unless that sum with interest be paid within one hundred and eighty days therefrom to Stewart & Co., the mortgaged premises should be sold.

The court further found that when Hopkins made the last two remittances, of $10,000 and $48,025, respectively, it was with the intent and the express instruction in writing to Stewart & Co. to apply them in discharging the mortgage claim; that Stewart & Co. refused to do so, but assumed, without his authority or consent, to apply and did apply them to his credit on the general account against him for merchandise; and that Stewart & Co. had no right to make such application; and that the remittances remained in their hands as his moneys from the several days of their payment until Feb. 29, 1868, when the title of Jordan as trustee attached thereto. It also found that the said two several sums were not subject to any claim of set-off or cross-demand, or of mutual debts or credits, on the part of Stewart & Co., under § 20 of the Bankrupt Act, or otherwise.

The court, therefore, rendered a decree in favor of Jordan, trustee, against Stewart & Co., for $58,025, the aggregate of the last two remittances, with interest, amounting in all to $75,981.36.

The case was carried, by the petition in error of Stewart & Co., and the cross-petition in error of Jordan, trustee, to the Supreme Court of Ohio, by which the decree of the Superior Court was affirmed.

Stewart & Co. thereupon brought the case here by writ of error. Some of the members of the firm have died, and Libby and another are its surviving members.

Mr. Justice WOODS, after stating the facts, delivered the opinion of the court.

The only question to which our attention is directed by the plaintiffs is that of set-off under the twentieth section of the act of March 2, 1867, c. 176 (14 Stat. 517), which is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate; Provided, that no set-off shall

be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition." This provision was in force at the time of the trial, and is now substantially incorporated in § 5073 of the Revised Statutes.

The contention of the plaintiffs is that they were entitled under this section to set off an unsecured account due them from Hopkins against the $58,025 remitted to them by him with directions to credit it on his mortgage debt, and which they refused so to apply.

Waiving the difficulty that they have not pleaded that account as a set-off, we shall consider the question made by them. That account is a claim provable against the bankrupt estate, and it was not purchased by or transferred to them after the filing of the petition in bankruptcy. The controversy is, therefore, reduced to this issue: Were that account and the money transmitted by Hopkins to them, and held and not applied by them to the mortgage debt, mutual credits, or mutual debts which could be set off against each other under the twentieth section of the Bankrupt Act?

The plaintiffs insist that the term "mutual credits" is more comprehensive than the term "mutual debts" in the statutes relating to set-off; that credit is synonymous with trust, and the trust or credit need not be money on both sides; that where there is a deposit of property on one side without authority to turn it into money, no debt can arise out of it; but where there are directions to turn it into money it may become a debt, the reason being that when turned into money it becomes like any other mutual debt. They say that the first of the two remittances under consideration is not proved to have been other than money, but as it was only $10,000 its application to the note could not be required. The larger remittance was in drafts, and their application could not be required. But there was authority to turn them into money, and that to get the money on them it was necessary that the drafts should be indorsed by the plaintiffs, and that the indorsement to and collection by them put the money received in the same plight as if the drafts had been sent to them for collection. We cannot assent to these views, and they receive but little support from the adjudged cases.

Ex parte Deeze (1 Atk. 228) arose under the twenty-eighth section of the statute 5 Geo. II, c. 30, which provides that "when it shall appear to the said commissioners [in bankruptcy] or

the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them or the assignees of such bankrupt's estate, shall state the account between them, and one debt shall be set against another, and what shall appear to be due on either side on the balance of said account, and on setting such debts against one another, and no more shall be claimed on either side respectively." In that case, a packer claimed to retain goods not only for the price of packing them, but for a sum of £500 lent to the bankrupt on his note. Lord Hardwicke determined that he had such right on the ground of mutual credits, holding that the words "mutual credits" have a larger effect than "mutual debts," and that under them many cross-claims might be allowed in cases of bankruptcy, which in common cases would be rejected.

But this ruling was subsequently made narrower by Lord Hardwicke himself, in Ex parte Ockenden (id. 235), and was in effect overruled in Rose v. Hart, 8 Taunt. 499. In that case trover was brought for cloths deposited by the bankrupt previously to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed. It was held that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy, for there was no mutual credit within that section. And the court declared that the term "mutual credits" in the act meant only such as must in their nature terminate in debts.

The rule established in this case, as to the nature of the credits which can be the subject of set-off, has been declared in other cases. Smith v. Hodson, 4 T. R. 211; Easum v. Cato, 5 Barn. & Ald. 861. The effect of the authorities is, that the term "mutual credits" includes only such, where a debt may have been within the contemplation of the parties.

These authorities make it clear that, even under the Bankrupt Act of 5 Geo. II, the plaintiffs would have no right to the set-off claimed by them. And they lose sight of the controlling fact that the money and the drafts which they turned into money were remitted, with express directions to apply them on a specific debt. Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs, and that consent has never been given.

Whether or not he had the right to direct the application is immaterial. There was no legal obstacle to the application as directed. The fact that he gave the direction imposed on the plaintiffs the obligation to apply the money as directed, or to return it to him.

They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from him to another of his creditors, or than they had to apply to the payment of his debt to them money which he left with them as a special deposit.

Hopkins sent them the money and drafts, upon the faith and trust that they would be applied according to his instructions. The refusal so to apply them did not change the relations of the parties to this fund, nor make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed. Winslow v. Bliss (3 Lans. (N. Y.) 220) and Scammon v. Kimball (92 U. S. 362), cited by the plaintiffs to support their contention, are cases where a bank or banker was allowed to set off the money of a depositor against a debt due from him to the bank. The answer to these authorities is that the relation between a bank and its general depositor is that of debtor and creditor. When he deposits moneys with the bank, it becomes his debtor to the amount of them. Foley v. Hill, 2 H. L. Cas. 28; Bank of the Republic v. Millard, 10 Wall. 152; Bullard v. Randall, 1 Gray (Mass.), 605. When, therefore, he becomes indebted to the bank, it is a case of mutual debt and mutual credit, which may well be set off against each other.

But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt. When A. sends money to B., with directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting.

Another answer to the contention of the plaintiffs is found in the language of the twentieth section of the Bankrupt Act of March 2, 1867, c. 176, which differs materially from that of the twenty-eighth section of 5 Geo. II, c. 30. In our act the terms "credits" and "debts" are used as correlative. What is a debt on one side is a credit on the other, so that the term

"credits" can have no broader meaning than the term "debts." We find no warrant in the language of the section or its context for extending the term "credits" so as to include trusts. Generally we know that "credit" and "trust" are not synonymous terms. They have distinct and well-settled meanings, and we see no reason why they should be confounded in interpreting the twentieth section of the Bankrupt Act.

To authorize a set-off there must be mutual credits or mutual debts. The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his instructions, did not make them his debtors, but his trustees. So that there were in the case no mutual credits or debts. The indebtedness was all on the side of Hopkins. The plaintiffs owed him nothing. They held his money in trust to apply it as directed by him.

They refused to make the application as he directed. They held it, therefore, subject to his order. They continued so to hold it until the rights of the trustee in bankruptcy attached, and until he sought to recover it by his counter-claim filed in this case.

The only contention of the plaintiffs set up in this court is that the Supreme Court of Ohio approved of the action of the Superior Court of Cincinnati, in refusing to allow the plaintiffs to set off the unsecured debt due to them by Hopkins against funds intrusted to them by him for an entirely different purpose. We are of opinion that the decision of the Superior Court was correct. The judgment of the Supreme Court of Ohio must, therefore, be affirmed.[26a]

Ex parte WHITING—Re DOW et al.

2 Low. 472

(District Court, Massachusetts. March, 1876)

LOWELL, J. The facts, as I understand them, are, that in 1874 the firm of Dow, Hunt & Co., the bankrupts, of which firm A. C. Cushing was a partner, borrowed $3,000 of a savings bank, for which they, as a firm, and Cushing and the petitioner, Whiting, individually, gave their joint and several promissory note. This note the petitioner paid to the bank in full, after the failure of Dow, Hunt & Co., but before their bankruptcy. The parties differ in their mode of looking at this note. The petition repre-

[26a] See Morris v. Windsor Trust Co., 213 N. Y. —, 106 N. E. 753.

sents it as signed by Dow, Hunt & Co., and Cushing, as principals, and by the petitioner as surety, while the answer represents it to be the note of Dow, Hunt & Co. as principals, and Cushing and the petitioner as co-sureties, and alleges that the money went to the firm exclusively. Upon the face of the note I should suppose that the answer puts the contract correctly, and I shall so consider the case for the purposes of the present decision, though it is a point upon which evidence outside of the note is of course admissible. In 1875, the petitioner lent $1,396 to the firm of Dow, Hunt & Co., and Cushing transferred to him eight shares of the capital stock of the Hingham Steamboat Company as collateral security, which Whiting promised to return on payment of the $1,396 with interest. This debt was overdue and unpaid at the time of the bankruptcy. This stock is worth more than $1,396 and interest, and the assignee has offered to pay the amount of that debt upon a reconveyance of the stock. The question is, whether Mr. Whiting can hold the surplus proceeds of the shares by way of set-off against Cushing's other debt to him, for contribution as co-surety of the note above mentioned.

I have had occasion more than once to look carefully at the cases on the subject of mutual credit in bankruptcy; and while the decisions in this country agree entirely, as far as they go, with those made in England, the subject has been more fully considered in that country, as is natural, the bankrupt law having been in force there for a much greater length of time. The leading cases on the subject are Rose v. Hart, 8 Taunt. 499; Young v. Bank of Bengal, 1 Moore, P. C. 150, much more fully reported 1 Deacon, 622; Naoroji v. Chartered Bank of India, L. R. 3 C. P. 444; Astley v. Gurney, L. R. 4 C. P. (Ex. Ch.) 714. All those cases should be studied. The result of them is, that a creditor who at the time of the bankruptcy, has in his hands goods or chattels of the bankrupt with a power of sale, or choses in action with a power of collection, may sell those goods or collect those claims, and set them off against the debt the bankrupt owes him; and this, although the power to sell or to collect were revocable by the bankrupt before his bankruptcy; or, in other words, the occurrence of bankruptcy in such cases gives a sort of lien which did not exist before. This has been the law ever since Rose v. Hart, 8 Taunt. 499. Before that decision, it was admitted even in cases where there was no power of sale. Young v. Bank of Bengal, *ubi supra*, adds this limita-

tion, and this only, that if the right to sell the pledge does not arise until after the bankruptcy, then there is no set-off for the surplus; for the reason that the assignee might redeem instantly, before any such power existed, and the creditors shall not be prejudiced by any failure or neglect to redeem; or, to put it in another way, that the rights of the parties are fixed at the date of the bankruptcy.

I have not overlooked the fact that in Young v. Bank of Bengal a good deal is said about the agreement to return the surplus. In this case there is an agreement to return the shares when the debt is paid. I do not consider the case cited to stand on this ground, but on that already mentioned, that the credit did not exist at the date of the bankruptcy. See that case explained by Parke, B., one of the judges who decided it, in Alsager v. Currie, 12 M. & W. 751, and by the judges in the late cases above cited. I apprehend that, when shares are conveyed in this way as collateral security, the law implies a promise to return them on the payment of the debt, and its expression cannot properly affect the case. In all the cases there has been either an express or an implied promise by the agent or other person having the property, that he would faithfully account for it and pay over its proceeds; but this does not prevent a set-off in bankruptcy. And the weight of authority is that a promise of this sort does not bar a set-off, either under the ordinary statutes or under the bankrupt act, unless the property has been intrusted to the agent for a particular purpose inconsistent with such an application of the surplus, so that this would be a fraud or breach of trust: see Key v. Flint, 8 Taunt. 21; Buchanan v. Findlay, 9 P. & C. 738, for cases of this sort; and, for the general rule, Cornfroth v. Rivett, 2 M. & S. 510; Eland v. Carr, 1 East, 375; Atkinson v. Elliott, 7 T. R. 378.

In this case, the debt of $1,396 was overdue and unpaid, and by a statute of Massachusetts Mr. Whiting had a right to sell the shares after giving a certain notice. This law enters into the contract of the parties; and though there is no evidence of a power of sale conferred by Mr. Cushing (the form of the transfer was not put in evidence), yet they will be taken to have understood that there would be a power of sale in accordance with the statute. On the day of the bankruptcy, Cushing was indebted to the petitioner for one-half the note of the firm actually paid by his co-surety, the petitioner, two weeks or more before that time. This makes out a case of mutual credit upon the

authorities cited and the others which have followed them: a debt due from Cushing to the petitioner, and choses in action of Cushing's, with a present power of sale in the petitioner's hands.

* *

Petition granted.

In re HARPER

175 Fed. 412

(District Court, N. D. New York. January 4, 1910)

RAY, District Judge. On the 26th day of February, 1908, an involuntary petition in bankruptcy was filed against the above-named bankrupt, Howard E. Harper, by Peninsular Paint & Varnish Company, and this petition alleged that such company was a creditor of said Howard E. Harper. March 12, 1908, said Harper filed a voluntary petition in bankruptcy, and filed schedules in which he states that said Peninsular Paint & Varnish Company is a creditor to the amount of about $3,500, but also sets forth that the said company is indebted to him in the sum of $6,500. The nature of this last-mentioned alleged indebtedness will be referred to later. On his voluntary petition Harper was adjudicated a bankrupt on the 16th day of March, 1908, and thereafter, and on the 27th day of March, 1908, the two proceedings were consolidated, and Harper was adjudicated a bankrupt under the involuntary petition, also without answer or objection. No issue was raised as to the validity of the claim of the Peninsular Paint & Varnish Company by Harper or any of his creditors. After adjudication and consolidation such proceedings were had that a trustee was duly appointed. He qualified and entered on the discharge of his duties. Thereafter the said company, hereafter called the "Peninsular Company," filed its duly itemized and verified claim with the referee. It is in due form, and is a valid proof of claim on its face. Certain creditors, at the first meeting of creditors, filed objections thereto; but, for the purpose of electing a trustee, it was temporarily allowed, with the understanding that later the trustee should file objections, so as to test the validity of the claim. On the 29th day of July, 1908, the trustee filed his petition for the reexamination of such claim of the Peninsular Company. September 23, 1908, said company moved for an order quashing the

objection filed by such creditors and dismissing the said petition of the trustee. The motion was based upon the petitions and proceedings for adjudication, the schedules of the bankrupt, the proof of claim of the Peninsular Company, the objections thereto, the said petition of the trustee, certain testimony given by the bankrupt on his examination in the proceedings, and on the petition filed by the trustee for a settlement of the estate of such bankrupt. The referee denied the motion to quash the objections and dismiss the petition of the trustee to re-examine the claim of said Peninsular Company, and this proceeding for a review of that decision follows:

The claim of the Peninsular Company, amounting to $3,391.17, after deducting payments and credits for discount, shortage, and merchandise returned between October 10, 1906, and October 23, 1907, is for goods, wares, and merchandise sold and delivered to said Harper between October 13, 1906, and July 18, 1907, "of the reasonable value and stipulated price of $6,272.87, no part of which has been paid, except the sum of $2,881.70, leaving a balance due, owing, and unpaid of $3,391.17, a statement of which account is hereto annexed and made a part of this proof; that said debt exists upon an open account and became due on the 5th day of June, 1907, that day being the average due date of the items of said account." * * *

A statement of items is annexed as referred to in the claim.

The objections filed by the creditors contain no denial of any allegation of the claim, but set up counterclaims alleged to exist in favor of Harper against said Peninsular Company connected with and growing out of the same transaction or transactions set forth in the claim. * * *

The affidavit of Harper, referred to in such objection and annexed thereto, so far as material, reads as follows:

"Rensselaer County, City of Troy—ss.:

"Howard E. Harper, being duly sworn, says that he is the bankrupt above named, and that the claim existing in his favor against the Peninsular Paint & Varnish Company, which claim is scheduled as an asset of the bankrupt estate herein, consists in substance of the following items:

"First. Damages sustained by deponent by reason of the false and fraudulent representations made by said Peninsular Paint & Varnish Company to deponent, by which deponent was induced to engaged in business in the city of Troy, N. Y., in or about the month of August, 1906, as the local representative of

said Peninsular Paint & Varnish Company in the sale of the goods manufactured by said company. Said representations were in substance to the effect that said company had business in this locality amounting to $20,000 per year. Said representation was false, and was known to be false by said company when it was made, and deponent relied upon such representation in making the contract, which was then made for the purchase by deponent of goods made by said Company. Deponent paid to said company about $2,300 for the first car load of paint mentioned in said contract. The purchase price of the second car load of paint mentioned in said contract amounted to about $1,900, and that amount has not been paid by deponent, but is included as a part of the claim of said company herein. By reason of the false representations made by said company to deponent, deponent has lost the $2,300 which he paid to said company, besides about 18 months' time and labor, which is worth to deponent not less than $3,000. That the business of said company in this locality did not amount to more than $5,000 a year. That the gross profits of said business, if it had amounted to $20,000 per year, would have been $4,000 per year, and the net profits to deponent would have been at least $2,000 per year. Said business amounted in fact to only $5,000 per year, and the gross profits thereof being but $1,000, there were not net profits to deponent, but an actual loss, not only of said net profits, but of money which deponent was obliged to borrow in order to carry on said business. Said amount of borrowed money amounts to at least $1,300, making the total losses sustained by reason of said false and fraudulent representations of the said Peninsular Paint & Varnish Company at least the sum of $6,600.

"Second. In and by the contract entered into between deponent and said Peninsular Paint & Varnish Company, in or about August, 1906, said company agreed to furnish to deponent the services of a capable salesman to assist deponent in disposing of the goods manufactured by said company in this locality for certain periods of the year, specified in said contract. Said company failed and neglected to furnish such salesman at the period specified in said contract, and when a salesman was eventually furnished to deponent for a short time by said company said salesman was incapable and inexperienced, and was of no assistance whatever to deponent. That by reason of the failure of said company to carry out its contract with deponent in respect

herein referred to deponent has suffered damages in the sum of at least $1,000.

"Howard E. Harper.

"Sworn to before me this 31st day of March, 1908.

"James W. Wright, Notary Public, Rens. Co."

* * *

It will be noted that the affidavit of Harper does not deny the sale and delivery and agreed price of the goods, wares, and merchandise, or the account stated, but sets up two counterclaims. The petition of the trustee admits the sale, etc., denies the account stated, and sets up, in substance, the same counterclaims.

The claim of the Peninsular Company is not based upon an account stated. That allegation may be wholly disregarded, and we have a complete and valid proof of claim, which, in the absence of objection, should and must be allowed as a valid claim to the amount stated. The trustee does not deny the sale and delivery of the goods to the bankrupt, the agreed price, the value, the payments, or the balance due. He simply denies that there was an account stated between the parties, which included this account.

This reduces the questions involved here to the propositions: (1) Whether or not valid actionable counterclaims or offsets are alleged; and (2) if so, can they or either of them be used to reduce or extinguish the otherwise valid, provable, and proved claim of the Peninsular Company?

* * *

But this question is not very important here, as the undisputed facts show that the Peninsular Company is a creditor to the amount stated, and the question is, really, whether the trustee may prove and have liquidated an unliquidated claim for damages, or claims for damages, of the nature stated, and if such claims, or either of them, are sustained, use the recovery to reduce or "wipe out" the claim of the Peninsular Company. If the trustee had come into possession of a valid promissory note of $3,000 made by the Peninsular Company, overdue, and belonging to the bankrupt and his estate after adjudication, is there any question that he could set it up as a counterclaim or offset to the claim of the Peninsular Company, and to that extent reduce its claim? I think not. Any debt, liquidated or unliquidated, owing to the bankrupt from a creditor of his, whether for damages or on contract, express or implied, which passes to the trustee, may, of course, be used by him to reduce

the claim of such creditor when presented, or to extinguish it altogether. § 68 of the bankruptcy act, as amended, provides:

"Set-Offs and Counterclaims.—(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

By § 70 of the act it is provided, in substance, that upon his appointment and qualification the trustee shall be—

"vested by operation of law with the title of the bankrupt, as of the day he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him; * * * (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to his property."

It is self-evident, I think, that rights of action for unliquidated damages for false and fraudulent representations, or for a breach of contract, whether assignable or not, are not regarded as property under subdivision 5.

Do the objecting creditors set up, or does the trustee in his petition set up or allege, "a right of action," existing in favor of Harper, prior to his bankruptcy, "arising upon contract"? Clearly neither of them set up a right of action arising from the unlawful taking or detention of his property. Do the creditors or trustee set up a right of action arising from injury to the bankrupt's property? The first counterclaim is to recover damages for false and fraudulent representations whereby the bankrupt was induced to enter into a contract to purchase paints and to enter on the business of selling or dealing in paints, whereby it is alleged he lost the sum of $6,500. The second counterclaim is to recover damages for a breach of contract in not furnishing a capable salesman to assist Harper in the disposal of goods manufactured by the Peninsular Company. Damages in the sum of $1,000 are alleged. In the first counterclaim no breach of contract is alleged. It is a cause of action (if one is sufficiently stated) to recover damages for false and fraudulent representations made by the company, whereby, relying thereon, the bankrupt, prior to bankruptcy, was induced to enter into a certain contract to engage in a certain business, and in such business purchase his stock of the Peninsular Company, all of which he did, and because of the false and fraudulent representa-

tions inducing such contract he lost $6,500. This is not a right of action arising upon contract. Is it one arising from injury to Harper's property? Code Civ. Proc. N. Y. § 3343, subd. 10, provides:

"An injury to property is an actionable act whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."

Was the making of these false and fraudulent statements an "actionable act," within the meaning of this provision of the law? No physical act is alleged which lessened the estate of Harper, unless it be that the making of false and fraudulent statements is a physical act, within the definition stated. The representations did not lessen or diminish the estate of Harper directly; but, the claim is, they induced Harper to enter into a contract which otherwise he would not have made, and that in the execution or attempted execution of same, without fault on his part and solely because of the fact that business conditions and surroundings were not as represented, he lost $6,500, and that thereby his estate was lessened to that extent. In other words, the false and fraudulent representations made to Harper by the Peninsular Company induced an act by Harper in the execution of which he lost $6,500. The gravamen of the cause of action is the false and fraudulent representations, the acts of making them; the result is damage by the loss of money belonging to Harper's estate, whereby such estate is diminished or lessened.

[After discussing certain New York cases, the court continued:]

This would seem to be a plain holding that material false and fraudulent representations which induce another to part with his property constitute an actionable act causing injury to property. If so, is it not a "right of action arising from an injury to his property"? However, Harper was not induced by the false and fraudulent representations to part with any property, or to stop any work on his property, or to pay men for time idle, and he lost no rental of property. He was induced by such representations to enter into a certain contract with the one making them, to purchase and engage in an attempt to sell certain property—risk that property in business—and in and by so doing, for the reason such representations were false, he lost his money or property. His estate was lessened. In this case the Peninsular Company not only made the representations, but was the party to be benefited by the contract. Harper was

to purchase of it his stock of goods, risk same in the business, and pay therefor to the company. He did under that contract purchase these goods mentioned in the claim of the Peninsular Company presented as a claim to the trustee of Harper's estate in bankruptcy. If Harper had not been adjudicated a bankrupt, and had been sued by the Peninsular Company for the price or value of the goods, he could have set up and pleaded this counterclaim. §§ 500 and 501, Code of Civil Procedure. § 500 permits the setting up of a counterclaim, and § 501 says:

"The counterclaim, specified in the last section, must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

"1. A cause of action, arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action on contract, any other cause of action on contract, existing at the commencement of the action."

This counterclaim, the one asserted by the trustee, does not arise on contract, and is not for damages for a breach of the contract on which the Peninsular Company relies; but it is a claim to recover damages resulting from the false and fraudulent representations of the party who, in effect, sues on the contract, who was a party thereto, and who induced the making thereof; and the contention of Harper's trustee is that, having been induced to enter into it by such false representations, and under and pursuant to it to purchase the goods in question and engage in the business of selling them, by reason of the falsity of such statements, he (Harper) lost his money or property.

This cause of action for the damages sustained is one connected with the subject of the action—that is, the claim of the Peninsular Company here—even if it is not one arising out of the contract or transaction on which that company bases its claim as presented to the trustee. It is a cause of action to recover damages sustained by reason of or as a consequence of the fraud perpetrated in inducing the making of the very contract the Peninsular Company relies upon as the basis of its claim, and which damages were sustained in executing or performing that very contract, so induced, for the benefit of the said company.

All this is settled by the decision of the Court of Appeals of the state of New York. Carpenter v. Manhattan Life Insurance Company, 93 N. Y. 552, 556; Thomson v. Sanders, 118 N. Y. 252, 258, 259, 23 N. E. 374. The words "subject of the action" mean "the facts constituting plaintiff's cause of action." Lehmaier v. Griswold, 40 N. Y. Super. Ct. 100, cited and approved Rothschild v. Whitman et al., 132 N. Y. 472, 476, 30 N. E. 858. The facts constituting the Peninsular Company's claim are the contract to sell goods, and the sale and delivery of said goods pursuant thereto, and a breach thereof by nonpayment. The counterclaim is that such contract was entered into because of false and fraudulent representations made by the company and relied on by the vendee or purchaser under the contract, resulting in great loss, because there was no market for the goods as represented. True, the representations preceded the contract, and the ordering and delivery of goods under it, and the loss; but they were all connected and followed in regular sequence. The case is not like Rothschild v. Whitman et al., 132 N. Y. 472, 30 N. E. 858.

I am therefore of the opinion, and hold, that the claim for damages passed to the trustee, if he has one, and that, as the Peninsular Company has presented its claim to the trustee, the trustee may establish such counterclaim before the referee, unless some other mode of establishing and liquidating same is directed.

My attention is called to In re Becker Bros., 15 Am. Bankr. R. 228, 139 Fed. 366. In that case the bankrupt had leased certain premises and was in possession. The landlord negligently allowed water to come in upon the leased premises, whereby the property of the bankrupt was injured. The landlord duly proved his claim for rent in the bankruptcy proceedings, and the trustee sought to counterclaim the alleged cause of action for such damages against the claims of the landlord for such rent. If under the laws of Pennsylvania the negligence of the landlord in allowing water to come in on the premises leased to the bankrupt, to the injury of his property constituted and created "a right of action in favor of such bankrupt, prior to his adjudication, arising from injury to his property," such right of action passed by operation of law to the trustee in bankruptcy, and it became his duty to enforce it and collect the damages for the benefit of the estate. It would be ridiculous to say that a right of action for damages which passes to a trustee is not to be enforced and collected by him for the benefit of the estate. If, then, the one

liable to the estate in an action for damages has and presents a claim against such estate, no matter what its character or how it arises, provided it be one properly provable and allowable against the estate in bankruptcy, are the trustee and referee to allow it, and pay a dividend or dividends, and proceed by action to enforce the claim for damages; or may the trustee establish the claim for damages and use it to reduce or wipe out such creditor's claim? The bankruptcy act itself says:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." § 68*a*.

Subdivision "b" of the same section adds the limitation or qualification, however, that:

"A set-off or counterclaim shall not be allowed in favor of any debtor of a bankrupt which is not provable against the estate."

This is not a limitation or restriction on the right of the trustee to set up, prove, and use any claim he has and which he may enforce against a creditor of the bankrupt presenting a claim against the estate he represents, provided it be a "debt" owing by such creditor to the bankrupt estate within the meaning of § 68*a*. The plainly disclosed policy of the act is that where a person is indebted to the bankrupt estate, and the trustee seeks to enforce the indebtedness, the debtor to the estate may set up as an offset or counterclaim only such just demands as he has against the estate which are provable in bankruptcy as a claim against the estate, unless it be one purchased or transferred to him after the filing of the petition in bankruptcy, or within four months before such filing, with a view to such use, and with notice or knowledge that such bankrupt was insolvent or had committed an act of bankruptcy. The debtor is limited to claims provable in bankruptcy. There is no provision or suggestion in the act that a claim against a creditor of the bankrupt in the hands of the trustee, and which came to him by operation of law on his appointment, cannot be used as an offset to or counterclaim against the claim of such creditor of the bankrupt estate, unless such claim in the hands of the trustee be one of a character provable in bankruptcy in case the one liable thereon had been adjudicated a bankrupt.

Congress had a perfect right to provide that a debtor to the estate shall not be allowed to offset or counterclaim demands or

claims against the bankrupt, unless they be of the class and character provable in bankruptcy, and also to provide what claims and demands and causes of action, existing in favor of the bankrupt at the time the petition was filed, shall pass to the trustee in bankruptcy and be enforced by him, and also to provide the mode of enforcement. Is a claim for damages for false and fraudulent representations a "debt," within the meaning and intent of § 68*a* of the act? If so, there is no doubt of the right of the trustee to offset or counterclaim same. § 1, subd. 11, of the act provides:

" 'Debt' shall include any debt, demand, or claim provable in bankruptcy."

It will be noted that some of these definitions in § 1 read "shall mean," while others read "shall include." It was not intended that definitions of words used in the act which read "shall include" should exclude other meanings or definitions of the word, or limit the ordinary and well-understood meanings. It was intended, as the words used plainly indicate, to make sure that they would be held to include what is expressed. If a statute should be written prohibiting the sale of all intoxicating beverages, and a section should be added saying, the words "intoxicating beverages" as used herein shall include hard cider, would an intelligent court be justified in holding that the words "intoxicating beverages," used in the act, had been defined to mean hard cider, and nothing else, and that whisky, rum, brandy, and other intoxicants were excluded, or not included? Yet cases may be found where this very interpretation has been put upon § 1 of the bankruptcy act.

It is quite true that the word "debt," given its common-law meaning, does not include a claim for unliquidated damages for false and fraudulent representations. Jackson v. Bell, 31 N. J. Eq. 554, 558; Duncan v. Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513; Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112. However, the word "debt" may include claims for unliquidated damages. In re Brouillard, 20 R. I. 617, 40 Atl. 762. There Gen. Laws 1896, c. 274, § 50, provided that a discharge in insolvency should release the insolvent from "all his provable debts." The same act provided that claims for trover and torts might be proved. It was held that the word "debts" was used in its generic and not its strict legal sense, and that claims for damages for torts were released. In Rosenbaum v. United States C. S., 61 N. J. Law, 543, 40 Atl. 591, 593, it was held that the statute providing for

sale and the division of proceeds amongst the creditors of an insolvent corporation in proportion to their debts included claims for unliquidated damages, and the word "debts" is used in its broad and no restricted sense. Damages for taking land is a debt due, when fixed and payable. Lowell v. Boston, etc., 106 Mass. 540.

In Berson v. Ewing, *supra*, the Civil Code provides that the liquidating partner may collect, compromise, or release any debts due the partnership, and pay or compromise any claims against it; and it was held that "debts" included claims—that the words were used synonymously. In New York the word "debts" includes every claim and demand upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action. Code Civ. Proc. § 2514.

A Wisconsin statute, providing that the homestead should not be liable to a forced sale "for any debt," means debts arising on contract and judgments for torts. Smith v. Omans, 17 Wis. 395, 397.

The words "debts contracted," as used in the Constitution of Michigan, are words of large import, and include all kinds of claims arising not only on contract, but in tort. Mertz v. Berry, 101 Mich. 32, 59 N. W. 445, 446, 24 L. R. A. 789, 45 Am. St. Rep. 379. See, also, Losee v. Bullard, 79 N. Y. 404; Munson v. Genesee, etc., 37 App. Div. 207, 56 N. Y. Supp. 139.

The bankruptcy act has provided that such a claim as is set up by this trustee shall pass to the trustee in bankruptcy as we have seen. It contemplates that he will do his duty, and establish and liquidate it in some court of competent jurisdiction. When so liquidated, it is a debt owing by the one against whom it is asserted beyond all question. Thayer v. Southwick, 8 Gray (Mass.) 229; Crouch v. Gridley, 6 Hill (N. Y.) 250; Johnson v. Butler, 2 Iowa, 535, 545; In re Book, 3 Fed. Cas. 867, 868. When that is done, the right of offset or counterclaim is perfect and complete. Claims of creditors are proved before the referee or court. § 57. § 63 states what debts may be proved; § 64 states what debts have priority; § 65 provides for the declaration and payment of dividends; § 66 takes care of unclaimed dividends; and § 67 takes care of liens. Then comes § 68, relating to "Set-Offs and Counterclaims," which is a limitation on the preceding sections relating to the allowance of claims and the declaration and payment of dividends.

* * *

I do not doubt that the claims set up by the trustee here and sought to be offset or counterclaimed passed to the trustee in bankruptcy. If he would enforce them, must he bring suit thereon for the benefit of all the creditors, collect the entire judgment for damages, if one is recovered, and apply the proceeds generally in marshaling the assets, or are they to be treated as debts owing by the creditor, and as subject to be offset when liquidated or established, and the amount due, if anything, ascertained? The latter is the construction the more favorable to the one liable in damages. He is not compelled to pay the entire recovery, and perhaps no part of it, depending on the amount of his claim against the bankrupt estate. On the other hand, if such a claim for damages is not regarded as the subject of offset within the meaning of § 68*a*, the trustee here must go to a foreign state and bring suit, and take his chances of making collection in case of recovery. §§ 23*b*, 60*b*, 67*e*. The Peninsular Company having come into this court with its claim, it has either made itself a party to the bankruptcy proceeding here, or has instituted a proceeding in bankruptcy, probably the latter. Coder v. Arts, 213 U. S. 223, 234, 235, 29 Sup. Ct. 436, 441, 53 L. ed. 772, where it is said:

"Arts appeared in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien for the security for his claim. We are of opinion that he thus instituted a proceeding in bankruptcy, as distinguished from a controversy arising in the course of bankruptcy proceedings."

In either case that claimant company is in this court seeking a dividend from the estate, and it seems clear to me that under the general policy and to answer the true purpose of the law the claim of the trustee is to be regarded and treated as an alleged debt of that company to the estate in bankruptcy, and, if established, offset or counterclaimed. There is no legal or equitable principle upon which it can be held that the creditor shall pay such claims for damages in full, if established, for the benefit of the estate, taking his percentage thereof by way of dividend on his claim when, if such claim for damages had been reduced to judgment against him prior to bankruptcy, he would be entitled to wipe it out in whole or in part by offsetting his claims against the bankrupt under § 68*a*. The cases all agree that a claim for damages arising from fraud or false and fraudulent representa-

ing creditors, by their levies, secured a preferential lien upon the property, not only as against Baird, but also as against the furnace company, which received a deed to the property November 5, 1900, after the attachments had been levied. These attachments, however, were annulled by the filing of a petition in bankruptcy against Baird within four months after the attachments were levied, and if the case stood upon this fact alone there could be no doubt that the property would pass to the trustee of the furnace company, discharged of the lien of the attachments. We are not concerned here with any conflicting rights of the two trustees, Staake and Shimer, since they were both appointed receivers of the Roanoke Furnace Company, and the only claim made by Shimer now is that, if the attachments be continued, the petitioner Staake be required to abate his claim against the estate of the furnace company by the amount of these attachments. It is therefore unnecessary to consider whether, if the attachments were annulled, the property would pass unencumbered to the trustee of the furnace company, since, as stated by the district judge, the demurrer to the petition is intended merely to raise the question whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

This depends upon the peculiar terms of § 67 of the bankrupt act, which provides as follows:

"§ 67*f*. That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, *unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate;* and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value

who shall have acquired the same without notice or reasonable cause for inquiry."

§ 67*c*, which also treats of liens created by attachments on *mesne* process, and provides for their dissolution, in the last clause declares that—"if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien, and empowered to perfect and enforce the same in his name as trustee, with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

This section (67*f*) makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors; that is, "for the benefit of the estate," —in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors.

The first provision contemplates the attachment of property to which the bankrupt has the complete, legal, and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since, under the first clause, the entire value of the property attached passes to the trustee, free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dis-

solved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy.

In the present case Baird had contracted to convey the property to the Roanoke Furnace Company, possession had been taken, and the consideration paid, but the deed was not actually executed and recorded until after the attachment had been levied. Hence, under the Virginia statute, the validity of which is not questioned, the lien of the attachment took precedence of the deed, and would have remained a prior lien, had it not been for the institution of the bankruptcy proceedings within four months. This dissolved the attachment, and, had the case rested here, the property would have apparently passed to the furnace company, or to its trustee in bankruptcy, Shimer; but at this point the court, under the second proviso of § 67*f*, interposed and recognized the lien of the attachment; not, however solely for the benefit of the attaching creditors, but for the benefit of Baird's estate. Shimer made no objection, and the court declined to express an opinion as to his rights.

This is one of the very contingencies provided for by the second clause of the section, which apparently vests in the court a certain discretion with regard to the preservation of the right acquired under the attachment or other lien. In this case the court recognized the validity of the lien, the trustee of the furnace company making no objection to this; but the attaching creditors insist that, as the lien was acquired for their own benefit, they should not be required to share with the general creditors of Baird's estate.

Their argument is based upon the theory that the second clause was not intended to apply to liens acquired upon the estate of third parties, but to property which would have passed to Baird's trustee had the attachment not been levied. In other words, that the bankruptcy court has nothing to do with the property, since it really did not belong to the bankrupt, and would have passed to his vendee if the attachments had not been levied upon it. Indeed, the opinion especially finds that "had valid attachments not been levied, the property would have passed to the trustee of the Roanoke Furnace Company."

To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It

took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition, but at the same time preserved to the general body of creditors, as against third parties (such as purchasers under an unrecorded deed), such liens as attaching creditors had secured upon property which would have passed to the subsequent purchaser in case the attachment had not been levied. It is true that the attaching creditors are thereby deprived of the fruits of their diligence, but the same thing would have happened had the attachment been levied upon property to which the bankrupt had the whole and undisputed title, or of which he had made a fraudulent conveyance. As remarked by the district judge, "In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the *pro rata* benefit of all the creditors." [126 Fed. 847.]

§ 67*f* is merely carrying out the general purposes of the act, of securing to the creditors the entire property of the bankrupt, reckoning as part of such property liens obtained by attaching creditors against real estate which had been transferred to another, though no deed had been actually executed and recorded.

The argument that § 67*f* in question here refers only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, we think is unsound, since that contingency is amply provided for by the prior clause of the section annuling all such liens and providing that property affected thereby shall pass to the trustee as a part of the estate. Under the argument of the attaching creditors in this case, the subsequent clause would be entirely unnecessary. This clause evidently contemplates that attaching creditors may acquire liens upon property which would not pass to the bankrupt if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken, doubtless this property would have been sold for the benefit of the attaching creditors.

The general rule relied upon by the bank in this case, that the words "property of the bankrupt" mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has only a bare legal title, is perhaps justified by our decision in Hewit v. Berlin Mach. Works, 194 U. S.

might, as respects his costockholders, subject him to the payment of more than his ratable share of the bankrupt's debts. It cannot be said, then, that the debts in question are in their nature both mutual and in the same right; nor that after the bankruptcy there was any reason for enforcing stockholders' liability or Bauman's ratable share thereof except for the equal benefit of all the creditors.

In Sawyer v. Hoag, *supra*, 17 Wall. at p. 622, 21 L. ed. 731, when passing upon a provision of the Bankruptcy Act of 1867 (14 Stat. p. 526, § 20), similar to § 68 of the present act, Justice Miller said:

"This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual; must be in the same right. The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."

To the same effect are Scammon v. Kimball, Assignee, 92 U. S. 366, 367, 23 L. ed. 483; Scovill v. Thayer, *supra*, 105 U. S. 153, 26 L. ed. 968; Babbitt v. Read (C. C.) 173 Fed. 712, 715; In re Howe Mfg. Co. (D. C.) 193 Fed. 524, 527; 1 Loveland on Bankr. (4th ed.) p. 661, and note 4; Collier on Bankr. (8th ed.) p. 796, and notes. And the rule that "unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of its creditors" is stated in Fogg v. Blair, 139 U. S. at p. 125, 11 Sup. Ct. 476, 35 L. ed. 104, to be "the settled doctrine of this court"; and, further, in Scovill v. Thayer, 105 U. S. 156, 26 L. ed. 968, it was held:

"Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

We have still to consider an important case recently decided by the Supreme Court of Ohio. It is Niles, Assignee, v. Olszak (87 Ohio St. 229, 100 N. E. 820, decided December 17, 1912), which holds:

"A stockholder in a savings and loan association organized under the laws of this state is entitled, when the association becomes insolvent, to set off, as against its assignee for the benefit of creditors, a claim for money which he has on deposit with the association against his liability for the unpaid part of his stock subscription."

That case is the nearest approach to this one of any other decided by the Supreme Court of Ohio, and so dispenses with the need of referring to other decisions of the court. We think the learned judge announcing the opinion pointed out facts which render the decision inapplicable here, when he said:

"The stock was not issued under the pretense of being or purporting to be fully paid, when in fact it was not paid for. There was no contrivance to release the debt for the stock, and substitute a loan therefor. It is not a case in which a corporation had held itself out to the public as having a larger paid-up capital than it actually had. * * * The statute prescribes * * * that no such association shall commence business until at least *one-half of each subscription has been fully paid up.* There is no claim that this was not done, and the presumption is that it was done. The finding of facts shows that the association was duly organized under the statute. There is no claim that it ever pretended that any more than 50 per cent. of each subscription had been paid in, or that any one ever gave credit on the faith that all of its stock had been paid in full. * * * It is common knowledge that many of the subscribers to the stock of such savings associations make their deposits therein with the intention and understanding that such deposits shall be made and used for the purpose of paying for the stock. * * *"

Thus it may be fairly inferred that all creditors of the savings bank were chargeable with knowledge that only 50 per cent. of its capital stock had been paid in, and that it was understood that the deposits should be applied to the payment of the balance due on the subscriptions. This in principle agrees with what we have already pointed out as recognized by the same court in the Gates Case, and by this court in Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co., respecting the rights of persons who extend credit to a corporation with knowledge

of the arrangement under which its stock subscriptions have been made. It may well be that as to all such persons the unpaid subscriptions do not constitute a trust fund, in the sense that it is not open to set-off.

Furthermore, any suit rightly to enforce payment of unpaid stock subscriptions would have to be of a plenary character (In re Haley, 158 Fed. 74, 85 C. C. A. 404 [C. C. A. 6th Cir.]; In re Remington Automobile & Motor Co., 153 Fed. 345, 347, 82 C. C. A. 421 [C. C. A. 2d Cir.]); and it does not appear that Bauman is a party to the present suit, although he appeared as a witness and so had notice of it. We are thus led to believe that the set-off was not permissible.

What, then, should be done with the claim of Steinle? We have felt bound under the present record to assume that Bauman is solvent. If the claim be allowed and permitted now to share in the assets, according to the undisputed statement of counsel for appellee, Steinle would receive a sum nearly equal to the amount found by the referee to be due from Bauman upon his subscription. Still, if Bauman could meet his unpaid balance, not to speak of the liability of any of his costockholders, no ultimate loss to the other creditors would ensue. If, on the other hand, Bauman should not be able to pay anything remaining due on his subscription, Steinle (who stands no better than Bauman) would profit at the expense of the other creditors. In the latter event, however, the reasons for denying the set-off (or at least its equivalent in the nature of an equitable defense) against the Steinle claim would cease; for nothing would be gained by suit upon the subscription, and so nothing could be lost by the general creditors by applying whatever sum is really due from Bauman toward payment of the Steinle claim. Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 615, 616, 14 Sup. Ct. 710, 38 L. ed. 565.

Since it would be obviously inequitable to permit the Steinle claim to share ratably in the assets before properly disposing of the question of Bauman's obligation and his ability to pay it (In re Wiener & Goodman Shoe Co. (C. C.) 96 Fed. 949, 950, and In re Duryea Power Co. (D. C.) 159 Fed. 783, 784, the underlying principles of which we regard as applicable), we are constrained to hold that the order of the court below allowing the claim should be reversed, with costs; that all proceedings upon the Steinle claim be stayed, and all dividends that would accrue on such claim, if allowed, be withheld and preserved,

until the Bauman debt and its availability be finally settled. If such debt be collected by the trustee, Steinle's claim shall be allowed in full; if by reason of his insolvency Bauman's debt is not collectible in whole or in part, Steinle's claim shall be accordingly reduced and the remainder allowed. An order will be entered reversing the cause, and remanding it for further proceedings, not inconsistent with this opinion.

NORFOLK & W. RY. CO. v. GRAHAM

145 Fed. 809, 76 C. C. A. 385

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906)

McDOWELL, District Judge. The following is an excerpt from the opinion of the trial court:

"This was a suit in assumpsit instituted by John T. Graham, trustee of the estate of O. M. Page, a bankrupt, against the Norfolk & Western Railway Company, for the recovery of certain moneys alleged to be due to said estate under a contract entered into between said Page and said railway company for the construction of a certain portion of its roadbed in West Virginia. The defendant pleaded nonassumpsit and also filed a notice of recoupment under the West Virginia statute, under which it sought to prove damages growing out of the contract or transaction upon which the suit was brought, to an amount equal to the demand against it.

"The parties by mutual consent waived a jury and submitted all matters of law and fact to the judgment of the court upon an agreed statement of all facts, from which statement it appears that O. M. Page entered into a written contract on the 11th day of August, 1902, with the defendant, by which he agreed to construct for it, at certain prices therein named, §§ 21 to 25 inclusive, of the Naugatuck Branch of the Ohio extension of its railroad. That, by the terms of the said contract, on or about the 15th day of each calendar month estimates of the work done by Page during the preceding month were to be made, and an advance payment of eighty-five per cent. (85%) thereof made to him, the remaining fifteen per cent. (15%) to be retained by the railway company as a compensation for or on account of any damages which might be certified by its engineer to have been sustained from any failure of the said Page to perform said contract. That Page performed work and furnished mate-

rials under said contract until the latter part of August, 1903, during the whole of which time his total work amounted, according to the terms of the contract, to thirty thousand seven hundred and fifty dollars and eleven cents ($30,750.11), all of which was paid him, excepting $4,612.52 of retained percentages, and $3,428.25 worth of work estimated to have been done in the month of August, making a total still in the hands of the railway company, retained percentages and August estimate, amounting to $8,040.77. That the retained percentages for the month of May, 1903, amounted to $1,070.53; for the month of June, $570.66; for the month of July, $651.13, and for the month of August, $604.99; all of which percentages are embraced in the sum total retained percentages of $4,612.52 above named, and are separated into months only for the purpose of showing what these percentages amounted to for the four months next preceding the adjudication of Page as a bankrupt. That Page broke his contract and abandoned his work on or about the 28th or 29th day of August, 1903, and the railway company, through its engineer construction work, branch lines, and in accordance with the terms of said contract, immediately declared in writing the same to be terminated and forfeited, which writing was filed with the railway company, a copy thereof mailed to Page's last known address, and another copy, as provided in the contract, posted at the front door of his office upon his work, on September 1, 1903. That a petition in bankruptcy was filed against Page on the 1st day of September, 1903, and he duly adjudged a bankrupt on the 10th day of said month. John T. Graham was chosen as trustee in bankruptcy by the creditors, and, by an order of the bankrupt court, was authorized and directed to institute this suit.

"It was further agreed that Page was insolvent at the time of his adjudication as a bankrupt, and that he was at that time indebted to laborers who had performed work for him upon the sections agreed to be constructed by him during the three months next preceding such adjudication, in amounts aggregating five thousand dollars ($5,000.00), but exceeding in no individual case the sum of three hundred dollars ($300.00), all of whose claims were proven in the bankrupt court, in accordance with the provisions of the act of Congress. It was further agreed that, after Page had abandoned his work and the railway company had declared his contract forfeited and at an end, it immediately advertised for bids in the customary way for the com-

pletion of the work that had been left unfinished by him. Many contractors made bids thereon, but after the exercise of due care and diligence in the premises upon the part of the railway company, one John T. McKinney was declared to be the lowest and best bidder, and the contract for the completion of the abandoned work of O. M. Page was given to the said McKinney. The new contractor entered upon his work and prosecuted the same with diligence, and under the reasonable supervision of the railway company, to completion; but, in consequence [as it was agreed] of the condition in which Page left the work that had been abandoned by him, the railway company was compelled to pay unto McKinney $11,112.80 more than it would have been required to pay to Page upon the completion of said work had he performed the same at the prices and in accordance with the terms agreed upon by him.

"The defenses of the railway company were two: (1) That, under the plea of non-assumpsit, and by the very terms of the contract itself, it did not owe Page anything; because it had a right to keep not only the retained percentages of $4,612.52, but the August estimate of $3,428.25, as well; the title thereto never having vested in Page, in consequence of his agreement that no money was to become due or payable to him or demandable by him until after the whole work had been completed in a satisfactory manner and certified by the engineer of the railway company, which had not been done. (2) That, even if said retained percentages and August estimate should be held to be a debt due from the railway company to Page, still nothing would be recoverable against the railway company in consequence of its right to recoup, to the extent thereof, or offset against the same, the damages occasioned to it by the very breach by Page of the contract sued upon."

The declaration consisted of the common counts in assumpsit and several special counts founded on the contract. It does not appear whether or not the railway company knew of the bankruptcy proceedings prior to the institution of this action. The trial court ruled in favor of the railway as to the fifteen per cent. retained from the various monthly estimates. But, being of opinion that defense as to the 85 per cent. of the August estimate could only be made by way of counterclaim, and that § 57*n*, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], barred such counterclaim, the judgment below was as to this item ad-

verse to the railway company. The opinion as to the effect of the bankrupt act reads as follows:

"The only other feature necessary to be considered is as to the applicability of the notice of recoupment filed with the plea of nonassumpsit. As the estate of Page, here represented by the trustee, is that of a bankrupt, the question as to the availability of this notice is solvable only under the provisions of the bankruptcy act, and under those provisions I must hold that it is ineffectual. It is provided by Act July 1, 1898, c. 541, § 68*b*, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], that a set-off or counter claim shall not be allowed in favor of any debtor of the bankrupt which is not made provable against the estate. This account for damages for failure to complete the bankrupt's contract is not so provable, because of lapse of time, and therefore cannot now be set off. It is not the character of the demand which precludes the right to set it off, but the failure to prove it in the proceeding in bankruptcy. Thus unliquidated claims may be set off against liquidated claims, provided they are provable in bankruptcy, and this, as I apprehend, requires that they be presented and proved before the referee. See § 63*b*, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447] and the discussion thereof in Collier on Bankruptcy (5th ed.) p. 488; Brandenburg on Bank (3d ed.) § 1005; Loveland on Bank (2d ed.) p. 282.

"Had the railway company chosen to liquidate and prove its claim it would seem that it would have been entitled to set it off against the debt due to the estate; but, not having proved its claim within the time limited, or taken steps to have it allowed in the bankruptcy proceedings, it cannot now be pleaded as a virtual set-off in this proceeding.

"Let judgment be entered for $3,428.25, with interest thereon from September 15, 1903."

As the railway company alone has filed assignments and sued out writ of error, we shall deal only with the propositions decided adversely to it. In view of the conclusion we have reached it is unnecessary that we set out the reasons which lead us to think unsound the contention made in behalf of the railway company to the effect that the contract gave the company the right to retain the 85 per cent. of the August, 1903, estimate as liquidated damages. We agree with the trial court that the right of the company to defeat the claim of the trustee could only be asserted by way of counterclaim. We must therefore now consider the question raised under the bankrupt act.

§ 57*n*, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], is a new provision, appearing for the first time in the act of 1898. The argument relied on by defendant in error may be briefly expressed as follows: The counterclaim of the railway company, while provable in its nature, was not proved in the bankruptcy proceeding within the time allowed by § 57*n*, and it was therefore when asserted in the court below not a provable counterclaim such as can be set off. So far as we have been able to discover there is no reported case which can be relied upon as a precedent for the view taken by the court below, and none that has more than a tendency to support the opposite view. As the trial court read § 57*n*, it is a statute of limitations applicable to the counterclaim of a debtor sued in an independent plenary action brought by the trustee in bankruptcy. We cannot so construe this provision. § 57 as a whole relates merely to the proof and allowance of claims against the bankrupt in the bankruptcy proceeding. The purpose of 57*n* is to speed the conclusion of that proceeding. One who is the debtor and the creditor of the bankrupt, whose claim against exceeds his debt to the bankrupt, must prove his claim in the bankruptcy proceeding within the time limit fixed by 57*n*, in order to share in the distribution of the estate. In re Muskoka Co. (D. C.) 127 Fed. 886. But we find no warrant for holding that his failure to thus prove it is a bar to the use of such claim in diminution of or to defeat the claim of the trustee when asserted in an independent action. If this clause of the act has the effect given it by the trial court, it is as effective when relied on against the counterclaim of one who has never heard of the bankruptcy proceeding, as it is when relied on against the counterclaim of one who has had full knowledge of such proceeding. And it is as effective in case the trustee brings his action after the expiration of the time limit fixed by § 57*n*, as in case he brings such action while there is yet time for the defendant to prove his counterclaim in the bankruptcy proceeding.

If in the case at bar the railway company had no knowledge of the bankruptcy proceeding until this action was brought, § 57*n*, as construed by the trial court, has the effect of depriving the company of a valuable right without an opportunity to be heard. The fact that no exception is made in behalf of one who first learns of the institution of the bankruptcy proceeding after the time fixed by this clause seems to us sufficient of itself for denying the clause effect in an independent action. But let

it be assumed that in the case at bar the company knew of the bankruptcy proceeding in ample time, and failed to prove its claim for the excess of its damages over the value of the unpaid for work, simply because it regarded the claim as worthless. Under this assumption, the discharge in bankruptcy, when granted, will bar the claim for the excess as a liability against Page (In re Hilton [D. C.] 104 Fed. 981); and the failure of the railway company to prove its claim deprives it of any possible right to share as a creditor in the distribution of the bankrupt estate (In re Shaffer [D. C.] 104 Fed. 982). But we think it cannot be true that such failure to prove the claim to the excess in the bankruptcy proceeding leaves the company in the position of a mere debtor. Statutes of limitation are strictly construed. But even if the rule of construction were otherwise, the language of the clause in question and its context seem to us to plainly limit its effect to proceedings in bankruptcy. In enacting the bankrupt act Congress could have had no reason for requiring a debtor creditor, whose claim against exceeds his debt to the bankrupt, to prove the excess and insist upon his rights as a creditor of the estate. And hence there was no reason for penalizing such failure by imposing a limitation upon the right of a person thus situated who does not wish to prove and claim the excess. The full purpose of § 57*n* seems to us to be subserved when it is held that the limitation applies merely to claims sought to be asserted in the bankruptcy proceeding.

We think the true solution of the question before us is that the counterclaim which may be set off in an independent action brought by the trustee is (subject to the restrictions of § 68*b*, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) one that is provable in its nature, and need not necessarily be one that has been, or may yet be, proved in the bankruptcy proceeding. § 20 of the bankrupt act of 1867 provided:

"That in all cases of mutual debts or mutual credits between the parties the account shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not provable against the estate. * * *"

§ 68 of the present act reads, so far as now material:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. A set-off or counterclaim shall

not be allowed in favor of any debtor of the bankrupt which is not provable against the estate."

In Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33-41, Mr. Justice Holmes, said:

"The present statute leaves out the words 'in its nature,' but we can have no doubt that it was intended to convey the same idea as the longer phrase in the last preceding act, from which in all probability its words were derived. 'Provable' means provable in its nature at the time when the set-off is claimed, not provable in the pending bankruptcy proceedings."

It may be true that Page's liability to the company was at the time of the filing of the petition and at the date of the adjudication contingent. But before this liability was asserted as a counterclaim it had become fixed and certain in amount. It was certainly provable in nature when it was asserted in the court below. The contention of defendant in error based on the theory that the railway company is securing a preference seems to us without merit. If a counterclaim is provable in its nature, and if it was not acquired as forbidden by § 68*b*, we find nothing in the bankrupt act to prevent its use under the circumstances existing here.

* * *

We are of the opinion that the learned trial court erred in rendering judgment against the railway company, and the judgment below must be reversed, and the cause remanded.

Reversed.

WAGNER v. BURNHAM

224 Pa. St. 586, 73 Atl. 990

(Supreme Court of Pennsylvania. May 10, 1909)

Assumpsit to recover balance due on a building contract by Louis Wagner, as trustee in bankruptcy of Charles Gilpin, against George Burnham and others. From an order discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals.

MESTREZAT, J. We think the learned court below was right in discharging the rule for judgment for want of a sufficient affidavit of defense. Charles Gilpin entered into a contract with the defendants to tear down an old building and erect a

new building in the city of Philadelphia. After performing part of the work, he filed a voluntary petition in bankruptcy, and was duly adjudicated a bankrupt. The plaintiff is his trustee in bankruptcy. At the date of the bankruptcy, Gilpin was indebted to certain subcontractors for work done and materials furnished who subsequently to that date entered mechanics' liens against the property of the defendants to enforce their claims. The defendants were compelled to pay these claims. This suit was brought by the trustee to collect the amount due Gilpin on the contract, and the defendants claim as a defense a set-off for the amount which they were compelled to pay the subcontractors on the mechanics' liens filed against their property. The right to interpose this set-off as a defense in this action and thereby defeat the plaintiff's recovery is the only question in the case.

The right to the set-off depends upon the provisions of the bankruptcy act (Act July 1, 1898, c. 541, § 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), relative thereto. The part of the act controlling the question is § 68, which provides, *inter alia*, as follows: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. A set-off or counterclaim shall not be allowed in favor of any debtor of a bankrupt which is not provable against the estate." Is the counterclaim or set-off of the defendants in this action allowable under this provision of the bankruptcy act? It is strenuously contended by the plaintiff that the defendants' claim was contingent, uncertain, was not provable against the bankrupt at the date of the adjudication in bankruptcy, and therefore cannot be allowed as a set-off. This view, however, we think entirely overlooks the nature and character of the defendants' claim as well before as at the time it was interposed as a set-off. At the date of the adjudication the bankrupt was indebted to the subcontractors on the claims which were subsequently paid by the defendants. The primary liability for payment of these claims rested upon the bankrupt, and the claims could have been enforced against him to the extent of his liability to pay. By the law of this state, however, the subcontractors had a lien against the property of the defendants for the work done and the materials furnished by them. This property was made subject to a statutory lien to secure the payment of the debts of the subcontractors, and by a

subsequent section of the statute the lien of the claim took effect "as of the date of the visible commencement upon the ground of the work of building the structure or other improvement." The lien of the subcontractor's claim, therefore, began with the commencement of the work on the defendants' premises, and was, of course, in full force and effect at the date of the adjudication in bankruptcy. It was inchoate from the beginning, it is true, but it was an existing claim or demand for which the defendants' property was liable on failure of the contractor to pay. During the time for filing the lien the subcontractors had a preferential statutory claim in the nature of a nonperfected equitable lien which was perfected by filing the lien after the adjudication in bankruptcy, but within the statutory period. In re Grissler, 136 Fed. 754, 69 C. C. A. 406. The statute provides the method for perfecting and enforcing the lien, and the bankruptcy of the contractor does not prevent its enforcement. § 20 of the mechanics' lien law of June 4, 1901 (P. L. 431, 3 Purdon's Dig. [13th ed.] 2487), makes specific provision for the enforcement of the claim after the insolvency or bankruptcy of the contractor as follows: "When any such contract has been suspended or ended, the right to file a claim or to sue under the contract shall remain, and may be exercised with the same effect as if further proceedings under such contract had been determined by consent of all parties." The work was done and the materials were furnished prior to the adjudication in bankruptcy. The subcontractors, therefore, had the right to file a lien and enforce it under the terms and within the statutory period provided in the act of 1901. The lien, however, of the subcontractors did not arise or was not created by the filing of the claim in the common pleas for the purpose of its enforcement, but came into existence at the commencement of the improvement of the defendants' property by the contractor. The claim, therefore, of the subcontractors, now held by the defendants and proposed to be set off by them against the plaintiff's demand, existed in its inchoate form at the date of the adjudication in bankruptcy, and was subsequently perfected by filing a lien in conformity with the provisions of the act of 1901. While the primary debtor of the subcontractors was the contractor whose duty it was to pay the claim, the property of the defendants, and hence the defendants themselves, were the statutory sureties for the payment of the debt of the bankrupt to the subcontractors. Bassett & Brown v. Baird, 85 Pa. 384. A surety paying the debt of his principal

after bankruptcy may under the bankrupt act of 1898 set off the amount so paid against his debt to the bankrupt. In re Dillon (D. C.) 100 Fed. 627. It is clear, we think, that the claim of the defendants sought to be set off in this action is for money expended by them as quasi surety for the bankrupt, and is therefore a "mutual credit" within contemplation of § 68 of the bankrupt act. It should not be overlooked that the right of the debtor to a set-off in an action brought against him by the trustee is not based upon the rules of equitable set-off administered in the state courts, but upon those rules which prevail in the federal courts which are generally broader and more liberal in permitting the set-off. These rules must be observed by the state courts in construing the bankrupt act.

Is the proposed set-off "provable against the estate" of the bankrupt within the meaning of § 68 of the act? This question must receive an affirmative answer unless we interpret the section differently from the decisions of two courts of the highest respectability, one of which is a federal court whose construction of an act of Congress we must accept. After a very careful consideration of the bankruptcy act, we are satisfied that the conclusion of those courts is correct, and that a counterclaim "provable against the estate" of the bankrupt by his debtor in an action brought by the trustee is such claim as is provable in its nature at the time the set-off is sought to be enforced. The status of the claim at that date determines its provability in contemplation of the act of Congress. This is conclusively shown by Holmes, C. J., now a justice of the Supreme Court of the United States, in the opinion in Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33. This was an action by a trustee of a bankrupt, and the defense was set-off, the defendant claiming that he occupied the position of a quasi surety who had paid and therefore was subrogated to the claim of a joint creditor of himself and the debtor. The right to a set-off under § 68 of the bankrupt act was the question at issue, and in delivering the opinion the chief justice said, *inter alia:* "The defendant also claims a set-off by virtue of his covenant. We assume that it has been adjudicated between the parties in the District Court that the defendant has not a claim which he could prove in his own name, and that this decision carries with it the corollary that he could not prove his claim on the covenant against the estate. If, therefore, the prohibition of a set-off of a claim 'which is not provable against the estate' is to be taken with simple literalness

as applying to any claim that could not be proved in the existing bankruptcy proceedings, the defendant's set-off cannot be maintained. But we are of opinion that the seemingly simple words which we have quoted must be read in the light of their history and in connection with the general provision at the beginning of § 68 for a set-off of mutual debts 'or mutual credits,' and that so read they interpose no obstacle to the defendant's claim. The provision for the set-off of mutual credits is old. But, while the provision as to mutual credits was thought to be more extensive than that as to mutual debts, it was held that even the broader phrase did not extend to claims which, when the moment of set-off arrived, still were wholly contingent and uncertain, such, for instance, as the claim upon this covenant would have been if the defendant had not yet been called upon to pay anything upon the original partnership debt. But the moment when the set-off was claimed was the material moment. The defendant's claim might have been contingent at the adjudication of bankruptcy, and so not provable in the absence of special provisions such as are to be found in the later bankrupt acts in England and in the United States act of March 2, 1867 (14 Stat. 517, c. 176), although not in the present law, and yet if it had been liquidated, as here, by payment, before the defendant was sued, he was allowed without question to set it off (citing authorities). The limitations worked out by these decisions were expressed in the section of the act of 1867 cited above, in the words, 'but no set-off shall be allowed of a claim in its nature not provable against the estate.' These words, as it seems to us, following the cases, refer yet to the nature of the claim at the moment when it was sought to set it off, not to its nature at the beginning of the pending bankruptcy proceedings, and did not prevent a set-off of a claim which was liquidated at the later moment merely because, when the bankruptcy proceedings began, for some reason it did not admit of proof. * * * 'Provable' means provable in its nature at the time when the set-off is claimed, not provable in the pending bankruptcy proceedings." This case is followed and approved by the United States Circuit Court of Appeals in Norfolk & W. Ry. Co. v. Graham, 145 Fed. 809, 813, 76 C. C. A. 385, 389. In that case it is said, *inter alia:* "We think that the true solution of the question before us is that the counterclaim which may be set off in an independent action brought by the trustee is * * * one that is provable in its nature, and need not necessarily be one

that has been, or may yet be, proved in the bankruptcy proceeding. * * * It may be true that Page's liability to the company was at the time of the filing of the petition and at the date of the adjudication contingent. But, before this liability was asserted as a counterclaim, it had become fixed and certain in amount. It was certainly provable in its nature when it was asserted in the court below."

It follows from what has been said that the judgment of the common pleas should be affirmed.

The assignments of error are overruled, and the judgment is affirmed.

NEW YORK COUNTY NAT. BANK v. MASSEY

192 U. S. 138, 48 L. Ed. 380, 24 Sup. Ct. 199

[See this case given on page 275, *ante*]

GERMANIA SAVINGS BANK & TRUST CO. v. LOEB

188 Fed. 285, 110 C. C. A. 263

(Circuit Court of Appeals, Sixth Circuit. May 2, 1911)

This is an appeal from an order of the District Court disallowing the claim of appellant against the bankrupt's estate in default of the performance of certain conditions hereafter stated. The proof of claim alleged an indebtedness of the bankrupt to the bank of $10,387.39. The proof was construed as claiming that amount as a balance remaining of $20,000 loaned by the bank, less $9,612.61 deposited by the bankrupt in the bank and applied by the latter as an offset against the original indebtedness. It is alleged in such proof, with reference to the origin of the debt, that on or about January 30, 1908, the bankrupt secured from claimant $20,000, upon representations that the company had a paid-in capital stock of $80,000; that it was a successful corporation, and had made profits in excess of $30,000; that on February 13th claimant first learned of the falsity of said representations, and thereupon demanded back its money. The trustee excepted to the claim upon the grounds, first, that the bank had received a preference of a large amount within four months before the bankruptcy, while the Mercantile Company was insolvent; and, second, that a large amount of the bank deposits were made under an agreement, between the rep-

resentatives of the bankrupt and the bank respectively, that they should be held as a special deposit, and that no right of offset existed as to such amount.

The referee reported, in substance sufficient for this opinion, the fact of the making of the loan of $20,000 about January 28, 1908; that about February 1st following it became known to the officers of the Mercantile Company that one of its officers was short in his accounts about $4,000, and had forged $6,000 of the stock of the company; that at least one of the officers of the Mercantile Company knew that as much as $35,000 of the capital stock of the company had not been paid for; that part of this forged stock had been hypothecated with appellant; that in order to avoid trouble with one of the stockholders, who had become dissatisfied, the president of the Mercantile Company had bought his stock, giving in part payment therefore the check of the Mercantile Company upon the appellant bank; that, for the purpose of ascertaining the exact condition of the company, its attorney had ordered an inventory taken; that on February 5, 1908, the officers and agents of the appellant bank knew of certain of the irregularities before stated, were advised of the order for taking an inventory, and that the books of the Mercantile Company were being audited, and had sufficient information to put them upon inquiry respecting the insolvency of the Mercantile Company; that the latter was at the time actually insolvent, and that its officers knew it; that on February 5th a conference was had between the respective attorneys of the bank and the bankrupt—the former having sent for the president of the Mercantile Company, and the attorney appearing in his stead, on account of the alleged illness of the president; that both attorneys realized that the Mercantile Company was in a critical condition; that the bank's attorney desired to protect its interests, and that the attorney of the bankrupt "realized that it would be dangerous at that time for any action to be started against the company, and was willing to do anything reasonable to prevent litigation;" that the bankrupt had at the time on deposit in the bank $5,970.23; that the bankrupt's attorney thought that, unless the bank could at once be satisfied, it would refuse to cash checks for the money then on deposit; that the bankrupt's attorney did not then know that his client was insolvent, and stated that he was informed and believed that it was solvent, that it owed not more than $65,000 and had $100,000 of assets, but that the exact condition could not be known

until the examination of the books and taking of inventory were completed, and stated that if the bank were to take steps at that time to protect its interests the collapse of the bankrupt's business would result, and asked that no action be taken by the bank, but that matters "remain as they are," under an arrangement that the Mercantile Company should draw out no more than it should subsequently deposit—thus always leaving a balance equal to the existing balance, and thus the bank be not prejudiced in case the Mercantile Company should prove insolvent; but that, while the evidence did not show whether the bank's attorney replied to this proposition, no objection was made to it, and that, the bank having accepted subsequent deposits, the Mercantile Company's attorney understanding the proposition was satisfactory, the former was bound by the transaction.

It appeared that on February 11th the accounting of the Mercantile Company's affairs was completed, showing that it owed upwards of $138,000, instead of not more than $65,000, as believed by its attorney at the time of the conference of February 5th; that but $28,000 of the $80,000 capital stock subscribed had actually been paid for; and that the inventoried assets amounted, at the valuation placed upon them, to but slightly more than the amount of the debts. The bank, upon learning this situation, on February 11th or 12th, refused to honor further checks of the Mercantile Company, and its checks to the amount of more than $6,000 drawn, and in part issued, for current expenses or current debts, were accordingly either dishonored by the bank or withheld from delivery, by reason of such notification from the bank. On February 13th the latter demanded from the Mercantile Company the return of the $20,000 borrowed, together with check for the balance of the latter's bank deposit, with notice that the bank had already applied the same upon said indebtedness. The creditors' petition for bankruptcy was filed the next day.

The referee held that the arrangement by which the money then on deposit should not be checked against did not constitute a preference under the circumstances of the case, including the fact that the bankrupt's attorney knew that if any of the representations made to the bank, on which the $20,000 was borrowed, were untrue, the latter could repossess itself of the money then on deposit, and that he also must have known that in case of insolvency proceedings the bank would have the right to offset the money then on deposit, and accordingly held that the

bank was entitled to offset the balance on deposit February 5, 1908, against the bankrupt's indebtedness. The amounts deposited in the bank after February 5th and until February 13th, less the amount of the checks cashed between those dates, was $4,514.08. The referee held that the Mercantile Company had the right to control its deposits made after February 5th, and that in view of the talk between the attorneys "the bank must receive the deposits as suggested, or decline them;" that it was the intention of the attorney and other officers of the Mercantile Company that the rights of both parties should be fixed on February 5th; and that the subsequent deposits were made by the agents of the Mercantile Company "with the understanding that they were not to be molested by the bank and that they would have the right to withdraw them as they saw fit;" and that as the Mercantile Company's affairs were being conducted by subordinate agents, who were striving to preserve the assets and protect the interests of all creditors alike until the exact condition of the business could be ascertained, the deposits made after February 5th were not made in the ordinary business way, but in such way as to create a trust relation, and thus to preclude a right on the part of the bank to offset them against the Mercantile Company's debt. It was accordingly ordered that upon the payment of the latter balance ($4,514.08), deposited after February 5th, the bank might prove its claim for what remained after making the offset of the balance previous to that date, together with its claim for the $4,514.08 so to be paid in, and that in default of such payment the entire claim should be disallowed.

The referee's order was reviewed by the District Judge, upon petitions therefor by both the bank and the trustee. The judge agreed with the referee as to the facts relating to the deposit balance of February 5th, but was of opinion that the agreement and understanding that the bank should withhold the taking of legal proceedings against the bankrupt until invoices should be taken and the exact condition of the Mercantile Company ascertained, and that the latter should not check against this balance, in connection with the arrangement for further deposits to be checked against, amounted to the giving of a preference to the bank, under § 60 of the act, and accordingly held that the bank had no right to offset the balance of February 5th against the bankrupt's debt. As to the balance of deposits made after February 5th, the judge approved the action of the referee in hold-

ing that such balance was a trust fund, and, while not in formal terms confirming the referee's conclusions of fact, in effect did so, holding that the bank's refusal to honor checks that were drawn by the bankrupt against this subsequent balance, and its attempt to apply the same to the indebtedness which the bankrupt owed the bank, amounted to a conversion. An order was accordingly entered denying the offset of $5,970.23, but providing that upon the payment of that sum to the trustee the bank might prove its claim for the entire amount of the debt, and that in default of such payment the entire claim be disallowed, but adjudging that the bank is a debtor to the estate of the bankrupt in the amount of $4,514.08, and rendering judgment in favor of the trustee accordingly, with interest from February 5, 1908, with provision for the withholding of dividends upon the bank's claim until the last-named sum, with interest, be paid, as well as for issue of execution against the bank for any balance thereof in case the item of $5,970.23, with interest, should not be paid, or in case the dividends did not amount to $4,514.08, with interest. The costs of the proceedings for review were adjudged against the bank. It is conceded by appellee that the proper balance on deposit February 5, 1908, was $5,098.53, instead of $5,970.23, as found by the referee.

KNAPPEN, Circuit Judge (after stating the facts as above). The first question presented is whether the agreement of February 5th between the Mercantile Company and the bank created, as to the then existing deposit balance of $5,098.53, a preferential transfer within the meaning of the bankruptcy act. § 60*a* of the act provides that:

"A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

§ 68*a* provides that:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

It has been authoritatively decided by the Supreme Court, in considering these two sections, that the balance of a regular bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt, with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against notes of the bankrupt held by it, and may prove its claim for the amount remaining due on the notes. N. Y. County National Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. ed. 380.

The Massey Case is decisive of the question we are considering, unless the case before us is distinguishable either by the fact that the notes here in question were not due at the time of the bankruptcy, or because of the existence of fraud or collusion between the bank and the Mercantile Company, with the view of creating a preferential transfer.

As to the nonmaturity of the notes:

The word "debt," as used in § 68*a* includes any debt provable in bankruptcy. Bankr. Act 1898, § 1, cl. 11; Loveland on Bankruptcy (3d ed.) p. 369. And a debt is provable, whether due or not at the time of bankruptcy. Bankr. Act 1898, § 63*a* (1). It is thus immaterial to the application of § 68*a* whether or not the notes were due. Collier on Bankruptcy (8th ed.) p. 793; Loveland on Bankruptcy (3d ed.) p. 372; Moch v. Market St. National Bank (3d Circuit), 107 Fed. 897, 47 C. C. A. 49; In re Semmer Glass Co. (2d Circuit), 135 Fed. 77, 67 C. C. A. 551.

A careful consideration of the record constrains us to the opinion that there was no fraud or collusion between the bank and the bankrupt for the purpose of creating a preferential transfer with respect to the deposit balance in question. It is not, and could not be, contended that there was any collusion in respect to creating this balance. If collusion existed, it must be found in the agreement between the bank and the Mercantile Company that the deposit should remain in the bank during the investigation of the solvency of the Mercantile Company, and for the purpose of permitting the bank to apply this balance upon its notes in case the Mercantile Company should turn out to be insolvent. This question must be answered in the light of existing conditions. The suggestion that the balance be not drawn upon came from the Mercantile Company's attorney, because he thought such arrangement only fair to the bank as preventing prejudice to it, through its failure to take action to protect its

interests, including the possible repudiation of the credit as obtained by misrepresentation. The Mercantile Company was at the time actually insolvent. The bank had the power (as distinguished from the right) to refuse checks upon its deposit balance. If the Mercantile Company proved insolvent, or the credit turned out to have been obtained by fraudulent misrepresentations, the bank had the right to so refuse. Such refusal would naturally have tended to precipitate hostile action by the creditors of the Mercantile Company, and when the condition of the company was actually learned would naturally have brought about bankruptcy proceedings. It was, to our minds, entirely proper that the Mercantile Company should, in these circumstances, arrange for a continuance of the existing status, which, should the Mercantile Company prove solvent, would be of benefit to it, and, should it prove insolvent, would merely give the bank the same rights as it would have if then existing insolvency were recognized. The transaction in no sense amounted to a hypothecation of this balance, as suggested by appellee's counsel. The fact that the bank had reason to believe the Mercantile Company was insolvent did not affect its right to set-off. In the Massey Case a portion of the deposits held applicable by way of set-off were made after the bank had knowledge of the debtor's insolvency. The testimony of the attorney of the Mercantile Company, in our opinion, distinctly repels the inference of an intent to give the bank a preference. We think the bank should have been allowed to offset the deposit balance of February 5th upon the bank's notes.

As to the balance of deposits made after February 5th:

If the bank held these deposits as trustee for the Mercantile Company, the right to set off the same against the latter's notes did not exist. Under the authority of Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. ed. 571, the bank was entitled to prove its debt with the set-off in question eliminated, but remained a debtor to the bankrupt for the amount of the deposits; and if such trust relation existed, the action taken by the court in protection of the bankrupt's estate, with respect to dividends on the bank's claim, in case of the latter's failure to make payment of the trust fund, was proper, unless as regards the award of execution for balance not covered by dividends, as to which question we do not find it necessary to express an opinion.

The alleged trust relation, including the conversion recognized

by the District Judge, rests upon the existence of an understanding between the bank and the Mercantile Company that the latter should be at liberty to withdraw the entire amount of its deposits made after February 5th, and that the bank should not be at liberty to set off against the Mercantile Company's notes any balance that should not be so drawn out, and that such deposits were not made in the ordinary course of business, but became in fact a special deposit. Upon a careful examination of the record, we are constrained to hold that the evidence does not warrant such conclusion. The referee has not found as a fact that there was any agreement to that effect between the parties, or even an understanding to that effect on the part of the bank. As we read the record, there is no direct testimony of any express agreement or mutual understanding to that effect. There is nothing in the testimony of the bank's attorney which, in our opinion, warrants such inference. On the other hand, the attorney for the Mercantile Company, while testifying to the statement to the bank's attorney that he would see that the Mercantile Company should not make withdrawals in excess of the new deposits, does not state that the bank was even asked to agree that all the new deposits might be checked against. The substance of the testimony of the Mercantile Company's attorney on this point is that he was anxious to have the banking relations continued without hostile steps upon the part of the bank, and that in order to induce the latter to continue such relations he agreed that the bank's status should not be impaired by an attempt on the part of the Mercantile Company to withdraw more than it should deposit. It is true that the Mercantile Company's attorney testified that his "idea was that the proposition was that the Block Mercantile Company should be absolutely free to withdraw every cent that it deposited after that date," and that "if there had been any scheme on the part of the bank, or anything that would have kept us from using the money during this investigation, I would have had to make some other arrangement and found another place to deposit," and that if he had understood in his own mind that his clients could not withdraw against subsequent deposits he would not have advised them to make their deposits in the same bank. To the definite question as to the bank's acceptance or rejection of the suggestion he replied:

"I want to say this: That Mr. Hirsh [the bank's attorney] was pressing me for information which I did not have, and I was

holding him up until I could get it, so it looked to me like a fair proposition. Now, as to whether that was accepted or rejected, in this way it must have been that I thought it was going to go through. I mean by that certainly I would be permitted to withdraw against deposits, or I never would have done it."

And again:

"I have stated repeatedly in this examination that I could not remember what answer that Mr. Hirsh made to my suggestion, as to continuing present deposits intact and the subsequent deposits to be withdrawn."

This testimony, in our opinion, falls short of evidencing a contract or understanding whereby the Mercantile Company should, under any and all circumstances, have the right to draw out all the new deposits, or whereby the new deposits should be held in any way as a special deposit differing from the ordinary bank deposit. The attorney of the Mercantile Company seems not unnaturally to have assumed that so long as the Mercantile Company was continuing to do business in the usual way, and in advance of a development of its insolvency, checks on the bank account would be honored. But we find no agreement or mutual understanding to that effect. Such course was in fact taken; for it was not until after the accounting of the Mercantile Company's affairs was completed, showing that its financial condition was much worse than believed by its attorney on February 5th, and suggesting probable insolvency, and indicating that a portion at least of the credit extended to the Mercantile Company was procured by false representations, that the bank refused to honor further checks. In our opinion there was, to say the least, no room for finding an understanding between the bank and the bankrupt that the bank waived its right of set off on account of any balance that might remain after such situation was found to exist. Nor do we think that the fact that the bankrupt's business was during the examination of its affairs being managed by subordinates, rather than by its usual officers, changed the nature of the deposits from the ordinary relation. * * *

It follows, from the views we have expressed, that the order of the District Court should be reversed, with directions to allow the balance claimed in full after the application thereon, by way of set-off, of the entire amount of bankrupt's deposit balance in the bank."[27]

27—See Heyman v. Third Nat. Bank, 216 Fed. 685.

SECTION IV

EXEMPTIONS

CHICAGO, B. & Q. R. CO. v. HALL

229 U. S. 511, 57 L. ed. 1306, 33 Sup. Ct. 885

[See this case given on page 497, *ante*.]

In re COHN

171 Fed. 568

(District Court, D. North Dakota, S. E. D. July 28, 1909)

AMIDON, District Judge. The above bankrupt filed his voluntary petition in bankruptcy on the 5th day of December, 1908. About the 1st of July, 1908, he made final proof upon a government homestead, and received his final receipt entitling him to a patent therefor. All debts scheduled by the bankrupt were incurred prior to the date of his making such final proof. In his schedules he claimed the homestead as exempt both under the laws of North Dakota and under § 2296 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1398). The trustee set the land off to him as his homestead, under the state laws. One of his creditors filed exceptions before the referee to this action of the trustee, and asked that an order be entered denying the bankrupt's right to the land as a homestead, and directing the trustee to take possession of the same and apply it to the satisfaction of the bankrupt's debts. This question was fully presented before the referee, by counsel for the respective parties, upon voluminous testimony. As the result of such hearing, the referee found that the bankrupt prior to the time of the filing of his petition in bankruptcy had removed from the state of North Dakota, in which the homestead is situated, and taken up his residence in the city of Minneapolis, in the state of Minnesota, and that he had thereby abandoned his homestead as an exemption under the laws of the state of North Dakota, and lost all right to claim the same as exempt under those laws; but the referee further held that the homestead was exempt from the claims of all creditors whose indebtedness was incurred prior to the date of the making of final proof, and entered an order so

declaring, and directing that the homestead be applied only to the payment of those debts, properly proven, which had arisen since the bankrupt made final proof for his homestead. A creditor whose claim accrued prior to the making of such final proof excepted to this order of the referee, and at his request the order has been certified to the court for review.

The bankrupt has filed no exceptions to the order of the referee, and cannot therefore be heard to object to any of its provisions. If this were not the case, it is quite likely that he would have just cause to complain of the order because it limits his exemption from debts to those which accrued prior to the making of his final proof; whereas, § 2296 of the Revised Statutes declares that the homestead shall not "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." There is no evidence presented here showing that any patent has ever been issued. It is the issuance of the patent which fixes the time when the property shall become liable to subsequent debts of the homesteader. Barnard v. Boller, 105 Cal. 214, 38 Pac. 728; Wallowa National Bank v. Riley, 29 Or. 289, 45 Pac. 766, 54 Am. St. Rep. 794.

Counsel for the objecting creditor contends that § 2296 of the Revised Statutes is repealed by §§ 6 and 70, subd. 5, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 548, 565 [U. S. Comp St. 1901, pp. 3424, 3451]). § 6 simply provides that the bankruptcy act shall not affect the allowance to bankrupts of the exemptions which are prescribed by state laws. Plainly this section deals solely with state laws. It is declaratory in its character. Its purpose is to save exemptions allowed by state laws, not to abolish those allowed by federal law. Its language is affirmative, and ought not to be given a negative effect, in the absence of a clear manifestation of such a legislative purpose. Potter's Dwarris, 69. § 70 declares that the trustee shall be vested with the title of the bankrupt (except property which is exempt), to all "(5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." The land in question does not come within the provisions of either branch of this section. Down to the time of final proof, the entryman could not transfer his homestead. §§ 2288 and 2291, Rev. St. (U. S. Comp. St. 1901, pp. 1385, 1390). Nor could any of the creditors whose claims have been proven have levied upon or sold the homestead for the collec-

tion of their debts. Such action is clearly forbidden by § 2296 of the Revised Statutes. Seymour v. Sanders, Fed. Cas. No. 12,690; Baldwin v. Boyd, 18 Neb. 444, 25 N. W. 580; Shoemaker v. Stimson, 16 Wash. 1, 47 Pac. 218; Jean v. Dee, 5 Wash. 580, 32 Pac. 460; Brown v. Kennedy, 12 Colo. 235, 20 Pac. 696. There is certainly no such inconsistency between the bankruptcy act and § 2296 of the Revised Statutes as would sustain a repeal of § 2296 by implication. Great Northern Railway Co. v. United States, 155 Fed. 945, 961, 84 C. C. A. 93, and cases there cited.

In some of the cases there are general remarks to the effect that the state law establishes the rule of exemption under the bankruptcy act, and that only such exemptions in value and kind as those laws permit can be claimed by the bankrupt. Steele v. Buel, 104 Fed. 968, 44 C. C. A. 287; In re Manning (D. C.) 112 Fed. 948; In re Wunder (D. C.) 133 Fed. 821. The question before the court in these cases, however, was whether a specific piece of property came rightfully within the terms of the state law granting exemptions. In none of them was the question raised whether a bankrupt was entitled to the protection of the few federal laws granting to him special rights as against his creditors. The question here presented therefore must be determined, not upon such general observations as are found in these cases, but upon the provisions of the statutes themselves. For example, Rev. St. U. S. § 1628 (U. S. Comp. St. 1901, p. 1122), declares that military uniforms, arms, and equipments shall be exempt from all judicial process These articles are not exempt under many of the state laws. Could it be reasonably contended that such articles pass to the trustee in bankruptcy because they are not covered by state exemption laws? I think not. The cardinal principle of the bankruptcy act is to grant to creditors only those rights which would have been theirs if bankruptcy had not supervened, and to save to the bankrupt and his family every right and exemption which would have been theirs as against creditors enforcing their claims by ordinary judicial process. Thomas v. Woods, 170 Fed. ——. This principle should not be departed from except in obedience to a command of the statute which is altogether clear. Such feeble inconsistencies as are here brought to the notice of the court would afford no justification for such action.

The decision of the referee must be affirmed, and it is so ordered.

In re BAKER

182 Fed. 392, 104 C. C. A. 602

(Circuit Court of Appeals, Sixth Circuit. May 3, 1910)

WARRINGTON, Circuit Judge. This is a proceeding to revise in matter of law a judgment denying to the petitioner a homestead exemption in certain real estate. The petitioner was adjudged a bankrupt under voluntary proceedings begun July 31, 1908. He presented with his petition and schedules his claim to the exemption under § 1702, Ky. St. (Russell's St. § 4661). His real estate consisted of an undivided one-fifth interest in three parcels of land, which descended to him upon the death of his brother in June, 1908. The lands were neither improved nor susceptible of partition; and the trustee in bankruptcy, under order of the referee made in November, 1908, sold the interest of the bankrupt in the lands for $926, and set apart the whole of the proceeds of sale to the bankrupt as exempt in lieu of his claim to a homestead. Prior to the bankruptcy proceedings some of the petitioner's creditors, whose claims antedated the inheritance, commenced suits in attachment and otherwise to subject the land to the payment of these debts. These creditors objected to any allowance of a homestead, and the order of the referee was set aside by the court below.

In view of Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), the validity of the action of the trustee in setting apart the bankrupt's exemption and the rights of the bankrupt in that behalf are to be tested by the law of Kentucky. The federal courts are accustomed in such cases to follow the decisions of the court of last resort of the state whose laws are so drawn in question. In speaking of the Constitution and statutes of Texas respecting homestead exemptions in a proceeding like the present one in Duncan v. Ferguson-McKinney Dry Goods Co., 150 Fed. 269, 271, 80 C. C. A. 157, 159, Circuit Judge Shelby said:

"It has been the policy of the state of Texas in its Constitution and legislation, as construed by the decisions of its Supreme Court, to favor by liberal interpretations the exemptions in favor of debtors. These decisions, construing the state Constitution and statutes, are as binding on this court as the Constitution and statutes themselves."

See, also, McCarty v. Coffin, 150 Fed. 307, 310, 80 C. C. A.

195; In re Wood (D. C.) 147 Fed. 877, 878; Huenergardt v. Brittain Dry Goods Co., 116 Fed. 31, 33, 53 C. C. A. 505; In re Irvin, 120 Fed. 733, 734, 57 C. C. A. 147; In re Meriwether (D. C.) 107 Fed. 102; In re Pope (D. C.) 98 Fed. 722; Loveland on Bankruptcy (3d ed.) § 177, p. 514.

Since the federal courts cannot administer or distribute exempted property as an asset of the bankrupt's estate, or do more than to set it apart to the bankrupt (Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. ed. 1061), this practice of the courts would seem to be in accord with the course pursued by Mr. Justice Gray respecting a dower right under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) in Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. ed. 865. See, also, In re Petition of Carrie E. Hays (decided by this court March 8, 1910) 181 Fed. 674.

The court below in terms recognized the binding effect in such matters of decisions of courts of last resort of the states in which the questions arise; but, as we understand his opinion the learned judge did not think any rule of decision on the present issue was settled in Kentucky. He said:

"At the outset I would emphasize that the homestead exemption is purely statutory. It is created by statute, and it exists only as it is so created. The courts cannot adjudge that to be such an exemption which is not such by the terms of the statute according to their intent and meaning. They are concerned solely with determining what that true intent and meaning is. This court, however, is not entirely free to do this. It is limited by any construction of the statute put forth by the Kentucky Court of Appeals, at least if it clearly appears that such is its construction, and there is no reason to think that in any future case it will not adhere thereto. I recognize fully this restriction upon me, and have no disposition to go beyond it. But the proper standpoint from which to view any particular construction of the statute by that court, and to determine accurately just what it is, is one's own construction. I will therefore at the first undertake for myself to ascertain the statute's true intent and meaning."

We of course agree that where the decisions of the State Court are in conflict, and point to no definite rule touching the construction of a statute of the state, the federal courts are quite as much at liberty to place their own construction upon the statute as they would be if the State Court had not con-

strued it at all. But if there be a rule of decision which is reasonably clear with respect to a given statute, we think the federal courts are bound in a case like this to follow the rule, rather than to undertake to determine upon their own interpretation whether the State Court may not change the rule in the future. The statute in question provides that:

"* * * there shall, on all debts or liabilities * * * be exempt from sale under execution, attachment or judgment, except to foreclose a mortgage given by the owner of a homestead, or for purchase money due therefor, so much land including the dwelling house and the appurtenances owned by debtors, who are actual *bona fide* housekeepers with a family, resident in this commonwealth, as shall not exceed in value one thousand dollars; but this exemption shall not apply to sales under execution, attachment or judgment, if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements thereon."

It is further provided in substance by § 1705 that where real estate—

"in the opinion of the appraisers, is of greater value than one thousand dollars, and not divisible without great diminution of its value, then the same shall be sold, * * * and one thousand dollars of the money * * * shall be paid to the defendant to enable him to purchase another homestead."

* * *

We do not feel called upon to comment on all the distinctions urged by learned counsel to exist between a number of the decisions cited in this opinion, and between some of them and others cited in their brief. Enough has been adduced to show what we conceive to be the plain trend of decision of the Court of Appeals, and also why we regard those decisions as controlling in the present case.

The judgment of the court below is reversed, with direction that the order of the referee be affirmed, with costs.

CHAPTER IV

COMPOSITIONS

ZAVELO v. REEVES

227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. 365

[See this case given on page 391, *ante*.]

In re HOXIE et al.

180 Fed. 508

(District Court, D. Maine. July 2, 1910)

HALE, District Judge. The bankrupts were duly adjudicated on the 15th day of March, 1910, upon an involuntary petition filed February 26, 1910. At the first meeting of creditors, claims of 44 creditors, amounting to $9,146.59, were filed. Claims of certain other creditors, duly scheduled, have not yet been presented for allowance. Appraisers have been appointed, and have filed their report, showing the value of the assets of the bankrupts to be: Real estate, $5,300, which is under mortgage for more than that amount; personal property, $4,481.95. The appraisers report that the basis of their valuation is partly at cost price and partly at possible selling value. After the bankrupts filed their schedule and were examined they offered a composition at the rate of 15 per cent. A majority in number of all the creditors whose claims have been allowed, namely, 29 creditors, representing $5,362.06, have accepted in writing the offer of composition. The referee reports the above facts. He recommends that the composition will be for the best interests of the creditors; that it is made in good faith, and not procured by any means, promises, or acts prohibited by the bankrupt law; and that the bankrupts have not been guilty of any act, or of any failure in duty, which would be a bar to their discharge. He also assigns certain reasons which have influenced him in coming to his conclusion.

It is provided by § 12*d* of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) that the judge shall confirm a composition if satisfied (1) that

it is for the best interests of the creditors. There being no question of the bankrupts having been guilty of any act or of any failure in duty which would be a bar to their discharge, and the offer and acceptance having been in good faith, the single question before the court is whether or not the confirmation of the composition is for the best interests of all the creditors.

The English rule appears to be that the approval of the majority of the creditors to the offer is final. Under our statute such approval is evidence, *prima facie*, that the composition is for the best interests of the creditors; and the burden is upon those who attack the composition. The same rule prevailed under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). In Ex parte Jewett, 2 Low. 393, Fed. Cas. No. 7,303, Judge Lowell said:

"In the absence of fraud and concealment, the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy."

Substantially the same issue is before the court under the present act. Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761; Adler v. Hammond, 104 Fed. 862, 44 C. C. A. 229; In re Waynesboro Drug Co. (D. C.) 157 Fed. 101.

Certain creditors object to the confirmation of the composition, and file specifications of objections. The examination of the bankrupts, and all papers relating to the estate, are before me. It is for the court to determine whether the nonassenting creditors have met the burden of showing that the offer of composition is inadequate, and that a substantially larger sum may reasonably be expected to result from the administration of the assets under the regular course of bankruptcy proceedings. A sum less than $1,500 is required to carry out the offer of composition. The appraisal shows assets amounting to about $4,500. The learned counsel for the bankrupts urge that the evidence shows the appraisal to be largely in excess of the available value of the property. It is not necessary to discuss in detail the different views taken by counsel touching this matter, or the testimony to it. It is in evidence that since the adjudication the business of the bankrupt firm continues to be carried on, and that many of the creditors who have accepted the offer continue to supply the bankrupts with goods, and to do business with them. It is urged that they are willing to accept the offer for the reason that their profits in future from the conduct of the business will fully repay them for their losses in bankruptcy. I do not esteem

it to be my duty to discuss the evidence in detail, or to decide what induced the assenting creditors to assent. The bankruptcy law does not make their decision conclusive, but only *prima facie*. Their assent does not relieve the court from passing on the question whether the composition is for the best interests of all the creditors. This question is addressed to the judicial discretion of the court, and from its conclusion either party may appeal. Adler v. Hammond, *supra*.

Upon a careful review of the examination of the bankrupts, the schedules, and all the evidence before me, I cannot avoid the conclusion that the nonassenting creditors have met the burden of showing that the acceptance of the composition will not be for the best interests of all the creditors. The whole testimony leads me to the conclusion that the assets should produce nearly double the offer of 15 per cent. It is with hesitation that I come to a conclusion opposed to that of the painstaking and competent referee, who assigns some very good reasons for coming to his conclusions. Some of the reasons which he assigns, however, are not tenable, and would enlarge the inquiry beyond its legitimate scope.

The offer of composition is not confirmed.

In re MESSENGILL

113 Fed. 366

(District Court, E. D. North Carolina. January 27, 1902)

PURNELL, District Judge. The referee for the Fourth division of the district certifies the following as having arisen in the course of the proceedings to consider a proposition of composition pertinent to the proceedings. The facts are certified that the creditor purchased several claims after the debts had been allowed. No pleadings or evidence accompany the referee's certificate. The question for consideration is thus stated:

"In determining whether or not a majority of the creditors, whose claims represent a majority of the indebtedness of this estate in bankruptcy, have signified their agreement in writing to accept 30% offer of composition, should E. F. Young, to whom a large number of creditors have sold their claims, be counted as one creditor, or as the number who have assigned claims to him? The referee holds that he should be counted as one creditor, and the bankrupt excepted and appealed to the district

judge. And the said question is certified to the judge for his opinion thereon."

The foregoing decision of the referee is affirmed. § 12, Bankruptcy Act, should be strictly construed. In re Rider, 96 Fed. 808, 3 Am. Bankr. R. 178. Where a claim has been assigned after proof, the real owner alone can vote. In re Frank, Fed. Cas. No. 5,050; Loveland, Bankr. § 105. He is one creditor, holding several claims.

In re RIDER

96 Fed. 808

(District Court, N. D. New York. October 6, 1899)

At the argument it was conceded that the accepting creditors did not represent a majority in number and amount of all the creditors whose claims have been allowed, but only such a majority of those whose claims were allowed at the first meeting of creditors. At the date of the argument, September 19th, not less than 30 creditors had proved their debts aggregating $8,554, and but 12 or 13 creditors representing $4,210 had signed the composition agreement. The claims of Holmes Rider, the father of the bankrupt, for $2,600, and of his mother-in-law for $446, are included in the above amount of $4,210. The referee, who has made a most careful and exhaustive return upon the law and facts, reports as follows: "At that session of April 15th the bankrupt was examined by his creditors. * * * After such examination and partly during the session of the meeting, but not as a part of the proceedings thereof, the bankrupt presented the proposed written composition herein to 11 of the 15 creditors in attendance, whose claims aggregated $3,745.44 of the $4,089.02 proved and allowed at that time, all of whom accepted the composition in writing at that time and place by instrument dated that day." It does not appear that the paper was presented to the remaining four creditors who had proved their debts. It was not presented to the general creditors at all and they had no formal information that a composition was on foot, except the notice that it would be presented to the court for confirmation. The composition proposed was to pay 30 per cent., one-third in cash, one-third in four months and one-third in six months. The deferred payments were to be evidenced by the notes of the bankrupt indorsed by his father. There is a marked dispute as to the value of the bankrupt's estate, the contesting creditors in-

sisting that it will pay much more than 30 per cent. The referee recognizes the possibility that this contention is well founded, but is of the opinion "that if the composition could be paid wholly in cash and without any part thereof being deferred, the creditors will realize more from a confirmation thereof than they will to have the estate administered in bankruptcy." Owing to the long delay occasioned by the contest the notes originally deposited are not now available as some of them have already become due. The amount deposited by the bankrupt for costs is also inadequate. The financial responsibility of Holmes Rider is assailed, but the referee finds that he is worth from $7,000 to $8,000 over and above his present liabilities.

COXE, District Judge (after stating the facts as above). The effect of a composition is to supersede the bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors. As an abstract proposition, considered for a moment apart from the provisions of the statute, it is entirely clear that a condition so plainly in derogation of common-law rights should not be permitted, unless it is reasonably certain that the creditors approve and that they will fare at least as well as they would were the estate administered in the usual course. It would be manifestly unfair and opposed to the basic principle of our institutions to permit a minority to dictate terms to a majority and compel them, in invitum, to take what the bankrupt chooses to offer, or nothing. Indeed, it has been considered a somewhat dangerous exercise of legislative power to compel even a minority to surrender all claim upon the debtor's estate at the dictation of the majority. Certainly no previous law has permitted a minority to force a compromise. Always the safeguard of a majority against favoritism and fraud has been preserved. The amendment of 1874 to the law of 1867 provides that "such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor." 18 Stat. 183, c. 390, § 17. A law which compels a creditor, against his will, to accept in discharge of his debt just what the debtor sees fit to offer, should be strictly construed. Loveland, Bankr. p. 549; In re Shields, Fed. Cas. No. 12,784.

The present law should be construed in the light of similar

prior enactments and any doubt should be resolved against those who seek to deprive creditors of the right to have the debtor's property applied to the payment of his debts. Nothing short of an absolutely plain and unambiguous provision will convince the court that congress intended for the first time, it is thought, in the history of bankruptcy legislation to vest such unusual and dictatorial powers with a minority of the creditors. It may be assumed that the language of § 12 is not as perspicuous as could be desired, but, read as a whole, the intention of congress seems plain to permit a compromise only when sanctioned by a majority in number and amount of the creditors whose claims have been allowed, after due notice to them of the bankrupt's proposition. If the construction contended for by the bankrupt be accepted it will lead to most inequitable results. Take, for illustration, a case where there are thirty creditors and only three have proved their debts, for equal amounts, at the time the composition is offered. If the bankrupt obtains the consent of two of them the composition must be confirmed, although the remaining twenty-eight creditors may be in open opposition.

§ 12 is easily capable of a construction compatible with the intent and purpose which has always ruled proceedings of this kind. After the bankrupt has been examined and filed a list of his creditors he "may offer terms of composition to his creditors." This plainly implies that the offer should be made to all his creditors whether they have proved their debts or not. It is not essential that proofs shall be made before, or at, the first meeting. They may be made at any time within a year after the adjudication and it is not necessary that they shall be filed, in the first instance, with the referee. § 57, c. n.

After the terms are thus made known to all the creditors they have a reasonable time to decide whether they will accept the offer or not. But in order to qualify themselves to vote upon the proposition they are required to prove their claims. The reason for this is obvious; it excludes from the voting all but *bona fide* creditors; it excludes all those who are too indifferent to present their claims and all whose claims are unliquidated, fictitious or exorbitant; it gives all creditors notice no matter what may be the nature of their claims and permits them to qualify, if they desire to do so, and assent to the compromise or oppose it, or, if they so elect, they may simply withhold their assent. After a fair opportunity has been given to all and the requisite majority of those whose claims have been allowed have

accepted it in writing an application to confirm the composition may be filed. Even then the composition may be rejected if the judge be convinced that it is not for the best interests of the creditors.

A construction which permits the bankrupt to select a time when but few creditors have proved and then to present his terms only to such creditors as he believes to be friendly to his interests, keeping the general creditors in the dark until he has obtained a majority of the few who have proved, is contrary to the intent and spirit of the law. It would enable a few active and friendly creditors on the spot so to manipulate the proceedings that the necessary majority could be secured while distant creditors were wholly ignorant of the proposed settlement. That the Supreme Court entertain views similar to the foregoing may be inferred from form No. 60 (18 Sup. Ct. xlvi.), adopted pursuant to general order 38 (Id. x.).

Without pursuing the subject further the court is constrained to deny the application to confirm this composition. The reasons for this conclusion may be briefly stated as follows:

First. It is not approved by a majority in number and amount of creditors whose claims have been allowed.

Second. No notice was given to the general creditors of the bankrupt.

Third. The composition was not presented to all the creditors whose claims were allowed.

Fourth. At the present time the consideration deposited is not in form to be distributed.

Fifth. The amount deposited as costs is inadequate.

Motion denied.

In re LEVY

110 Fed. 744

(District Court, W. D. Pennsylvania. July, 1901)

A majority in number and amount of bankrupt's creditors signed an acceptance of the offer of composition, whereby it was agreed to pay 25 cents on the dollar. Subsequently a number of the creditors who had agreed to accept such composition came into court, and desired to file a paper, asking leave to withdraw their acceptance, and that the application for the composition be dismissed; stating that when they signed the acceptance they were not aware of all the facts in the case.

BUFFINGTON, District Judge (orally). These creditors voluntarily came into court, accepted the proposed composition, and asked the court to act in the matter, and confirm the composition. They procured the court to act, and they are now estopped from interfering with the further conduct of the case in the matter of this composition. Had they alleged fraud or misrepresentation in the procuring of their signatures to the acceptance, the case would be different. They are presumed to have had the same knowledge when they signed as they have now. The application for their withdrawal will be refused, and the court will proceed to pass upon the merits of the proposed composition. If it is not for the best interests of the creditors, it can be shown on the hearing before the referee.

McCORMICK v. SOLINSKY

152 Fed. 984, 82 C. C. A. 134

(Circuit Court of Appeals, Fifth Circuit. April 15, 1907)

PER CURIAM. On the case made, the contract by the Citizens' National Bank of Beaumont, under which it advanced the money to pay the composition to creditors in the bankruptcy of E. N. Brown, was illegal, because a part of the consideration thereof was that the bank's debt against the bankrupt should be paid in full, notwithstanding the composition.

Solinsky was a party to the illegal contract, and therein agreed as a part of the inducement that he would return to the bank the amounts received by him under the composition as one of the creditors of the bankrupt, Brown. The present suit, being one to recover from Solinsky the amounts received by him under the composition, is clearly a suit to recover moneys knowingly advanced under an illegal contract.

The judgment of the Circuit Court is therefore affirmed.

In re GRIFFIN

180 Fed. 792

(District Court, N. D. Georgia. May 27, 1910)

NEWMAN, District Judge. The above bankrupt, M. M. Griffin, has applied to the court for the confirmation of a composition, which he has offered to his creditors and which has been accepted by a majority in number and amount. Objection

is made to the confirmation of the composition by the Silvey-Smith Hat Company for the following reason:

"Because said bankrupt obtained the property on credit from them upon a materially false statement in writing, made to them for the purpose of obtaining such property on credit; such statement being made on June 28, 1909, and being, as therein shown, made 'for the purpose of obtaining credit,' and standing 'good as to each purchase now and hereafter, unless there should be a material change, in which case [I or we] will notify them before making purchases from them.' Copy of said statement is hereto attached and made a part hereof, marked 'Exhibit A.' On such statement these objectors sold said bankrupt goods from time to time, and at the time the petition in bankruptcy was filed said bankrupt was and is indebted to these objectors on account of such purchases, as shown by statement of account hereto attached and made a part hereof, marked 'Exhibit B,' to which reference is prayed as often as may be necessary. Said statement was materially false, in that said bankrupt represented therein one house and lot located in Manchester, Georgia, of the value of $1,000, as among his assets. Said house and lot was at the time the property of said bankrupt's wife, and is still her property."

It appears, from the written statement of the bankrupt made to the objectors, which is in evidence, that among other assets shown by the statement, which amounted in all to $3,450, he claimed to have a house and lot located in Manchester, Ga., where he was doing business, of the value of $1,000. He now acknowledges that he did not own this house and lot, but that it belonged to his wife. That this was a material statement is clear, and that it was untrue is now equally clear.

§ 14 of the bankrupt act of July 1, 1898 (30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]), makes one of the grounds of objection to discharge:

"(3) Obtained property on credit from any person upon a material false statement, in writing, made to such person for the purpose of obtaining such property on credit."

§ 12 of the act provides:

"The judge shall confirm the composition if satisfied that * * * (2) the bankrupt has not been guilty of any of the acts, or failed to perform any of the duties, which would be a bar to his discharge."

It may be that to sustain the objection will prevent the creditors from getting as much as they would if the composition was accepted, but this cannot be considered in passing upon this objection. As Judge J. B. McPherson, in the District Court for the Eastern District of Pennsylvania, in a case very much like this (In re Godwin, 122 Fed. 111), said:

"It is very likely that the creditors may lose by the defeat of the proposed composition; but this consideration cannot be allowed to influence the court in deciding whether the bankrupt has been 'guilty of any of the acts, or failed to perform any of the duties, which would be a bar to his discharge.' Bankr. Act July 1, 1898, c. 541, § 12, cl. 'd' (U. S. Comp. St. 1901, p. 3427). I agree with the learned referee that the testimony establishes the fact satisfactorily that the bankrupt has committed one of the offenses specified in § 14, cl. 'b.' He has 'with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained.' This being so, I think the act requires me to refuse approval of the composition, without regard to the question whether the creditors would be benefited thereby; and the fact that only one creditor is actively objecting, while a large majority is in favor of taking what the bankrupt offers, is of no importance in the present inquiry."

The objection must be sustained, and the confirmation of the composition refused.

CHAPTER V

DISCHARGE

In re CHANDLER

138 Fed. 637, 71 C. C. A. 87

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905)

On October 27, 1902, the bankrupt was discharged from his debts by the court below. On October 23, 1903, a petition was filed by William H. Rhodes, John Gray, and Edward G. Pauling to revoke the discharge upon certain grounds therein stated. The only allegation in the petition with respect to the character of the petitioners is "that they are creditors of Frank R. Chandler, who has heretofore been adjudicated a bankrupt." To the petition a demurrer was interposed, and sustained by the District Court, and the petition dismissed. The proceeding here is to review and revise that ruling of the District Court.

HUMPHREY, District Judge. § 14*b* of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], provides that objections to discharge of bankrupts may be made by "parties in interest." The averment in the petition that the objectors are creditors is not such a statement as shows to the court that the petitioners are "parties in interest," within the meaning of the law. The petition does not make such a showing that the court can say that the rights of the petitioners were affected by the discharge. No facts are averred which would justify the legal conclusion that the petitioners are "parties in interest." It is not averred that they were creditors at the time of the bankruptcy. The character of their debt is not shown. It is not averred that their debt was provable in bankruptcy or was proved in the proceedings. The debt or debts they represent, from all that appears from the petition, may have been created since the discharge, or they may have become purchasers of the debts which were discharged, without right to attack the dis-

charge. We are of opinion that the petition should have shown that the petitioners had at the time provable debts against the bankrupt, which were affected by the discharge of the bankrupt. Otherwise they are not "parties in interest," within the meaning of the statute.

* * *

The decree is affirmed.[1]

GILPIN v. MERCHANTS' NAT. BANK

165 Fed. 607, 91 C. C. A. 445

(Circuit Court of Appeals, Third Circuit. November 21, 1908)

GRAY, Circuit Judge. This is a petition by a bankrupt, to revise for error of law the decree of the United States District Court for the Eastern District of Pennsylvania, reversing the referee's report and sustaining one of the creditor-appellee's exceptions to his application for discharge. The sole exception thus sustained, was to the effect that the referee had erroneously held that the "materially false statement" in writing, mentioned in clause (3) of § 14*b* of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026]), must, in order to constitute a bar to the discharge of the bankrupt, be intentionally or knowingly untrue. The facts of the case as summarized from the findings made by the referee, and elsewhere disclosed in the record, are as follows:

The bankrupt was engaged in the construction of buildings, at Baltimore, in places near New York City, and Philadelphia. His main office was in Philadelphia, where his books were kept by his bookkeeper. The bankrupt was chiefly engaged in the actual supervision of the building work he had in hand, and paid little or no attention to his books. He collected money, paid notes, and in a general way knew the condition and progress of each of his building contracts. He intrusted the keeping of his books to his bookkeeper, and in September, 1905, the posting of his books was some months behind. During that month, the bankrupt went to the Merchants' National Bank, at Philadel-

1—As to the right of the trustee to interpose objections, see In re Hockman, 205 Fed. 330.

phia, (the excepting creditor and appellee) and stated that he wished to open an account, and would require accommodations not to exceed $10,000. The bank informed him that they would like to have a statement, and gave him one of their blank forms, to be filled out and signed by him. This form the bankrupt took to his office, and there signed the same in blank, instructing his bookkeeper to fill it out and send it to the bank. He signed it in blank before it was filled out, for the reason that he was obliged to return to Baltimore without delay. He says he instructed the bookkeeper to make an exact statement for the bank, to which the bookkeeper replied that he could not, but that he would make an approximate statement and send it to the bank. The statement was made by the bookkeeper, and upon it was written the word "approximate," and it was sent by the bookkeeper to the bank. Upon this statement, and upon a note which the bankrupt was to obtain from one Stokes, of Baltimore, as collateral, the bank extended the accommodation desired. This note was never obtained for the bank from Stokes. About October 3, 1905, and after the said statement of September 28th had been filed by the bank, the note of the bankrupt for $7,500, due 30 days after date, was discounted. After two renewals and a payment of $1,000 on account, and the further discount of a 10 days' note of $2,500, the bank, on the 9th day of February, 1906, renewed the entire amount then due, viz., $9,000, for 30 days, which is still unpaid.

The adjudication of bankruptcy was entered February 26, 1906. The approximate statement sent by the bookkeeper to the bank was materially inconsistent with the bankrupt's books, as they stood at the time the bankruptcy occurred. There is nothing in the referee's report to show how the books actually stood at the time the statement was prepared by the bookkeeper. There is no evidence that the bankrupt ever saw this statement after it was filled out, that the bank ever showed it to him, or interrogated him in regard to it, or that he ever asked to see it. This statement showed a net worth of $43,569.27. The bankrupt himself made up from his books, during the course of his examination, a statement showing that his net worth at that time was $45,698.09. This statement, however, in all its items fails to coincide with the statement made up by the bookeeper and delivered to the bank.

The referee finds that, although the falsity of the statement sent to the bank has been proved, the fact that the bankrupt

knew it to be false, or did not know it to be true, was not proved, and says:

"There is no evidence to support the contention that the bankrupt knew or had any reason to believe that the statement sent to the bank by the bookkeeper was false, or that the bankrupt intended in any way to deceive the bank."

The referee, therefore, reported that a decree of discharge of the bankrupt should be entered. To the finding of the referee, as stated, the appellee filed its exception, and the court below, after considering the same, reversed the finding of the referee and directed that an order be entered, sustaining the said objection to the bankrupt's discharge.

§ 14 of the bankrupt act prescribed the conditions upon which a discharge may be granted to the bankrupt by the court of bankruptcy in which the proceedings are depending, and provides that the court shall hear and investigate the merit of the application and discharge the bankrupt, unless he has—

"(1) committed an offense punishable by imprisonment, as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or, (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4), at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6), in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

The single question of law presented for our consideration is clearly defined in the following extracts from the opinion of the court below:

"I accept and shall act upon the finding of the referee that the bankrupt either did not actually know what the statement contained, or did not know that it was materially false, and that he did not have a conscious intention to deceive the bank."

In concluding, the court said as follows:

"The other matter that may properly need a moment's consideration is the effect that should be given to the word 'false'

in clause 3. In my opinion the argument for the bankrupt must rest wholly upon the conclusion that this word should bear. It is unquestionably a flexible word. Sometimes it means incorrect, or not true; sometimes it includes the idea of wickedness or fraud—as in § 29, where a false oath is evidently a corruptly false oath, such as would subject the affiant to a prosecution for perjury. That 'false' means no more in clause 3 than 'not true,' I have tried to establish in the preceding pages of this opinion, and if I have failed hitherto to give good reasons to my belief I am sure that I shall not strengthen the argument by stating them again in somewhat different words.

"The decision of the referee is reversed and the clerk is directed to enter an order sustaining the first objection of the Merchants' National Bank to the bankrupt's discharge."

Addressing ourselves to the question thus distinctly raised, it is to be remarked that of the six reasons for refusing a discharge to the bankrupt, as set forth in § 14*b* of the bankrupt act, the five that relate to the conduct of the bankrupt, unless we exclude the third, with which we are here concerned, all imply a willful and fraudulent act on the part of the bankrupt, or, as in the case of the sixth, a willful and intentional defiance of a lawful order of the court. And they all imply conduct that is immoral, or at least unworthy in one seeking the reward of honesty that is intended to be conferred by a discharge. In the recent case, In re A. B. Carton & Co. (D. C.) 148 Fed. 63, 66, Judge Hough in the District Court for the Southern District of New York, adopts as a terse statement of his views, the following language:

"The policy of the bankruptcy act is founded on equal rights and privileges to all creditors; it is not intended as a means to punish the bankrupt at the option of the defrauded creditor only. Discharge from debts is a matter of favor and not a matter of right. Honesty on the part of a bankrupt is rewarded by a discharge. Fraud and dishonesty are stamped with disapproval of a discharge. Contumacy on the witness stand, a previous discharge within six years, obtaining money upon false statements, and the commission of an offense punishable by imprisonment under the act, are all valid objections to a discharge, and are not limited to the defrauded creditors alone, but may be urged by any and all creditors. It is the fraudulent conduct that is aimed at, and not retaliation for the individual loss."

We fail to perceive any sufficient ground for denying to the third reason for refusing a discharge to the bankrupt, the gen-

eral characteristic of personal misconduct that attaches to all the others, as set forth in the said section of the bankrupt act. It would indeed be a harsh construction, and at variance with the general policy of the bankruptcy act, that would make the conduct described in clause 3 an exception in this respect to the whole category of acts which may severally deprive the bankrupt of his privilege of discharge. It is a construction which should not unnecessarily be made.

But apart from the incongruity imported into this section of the bankruptcy act by such construction, it seems to us clear that the plain language of this third clause of § 14*b* requires that the written statement made by the bankrupt, for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, "false statement" connotes a guilty scienter on the part of the bankrupt. This primary and ordinary meaning of the word "false" cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. Webster gives as its primary meaning:—"Uttering falsehood; unveracious; given to deceit; dishonest." As an adjective, it is correlative with the noun "falsehood." To charge a person with making a false statement, is equivalent to charging him with uttering a falsehood, and imputes moral delinquency to the person so charged. It is true that the word may have a secondary meaning in certain collocations, and be merely equivalent to "untrue" or "incorrect." But this is not the ordinary or usual signification attached to the word. To charge a person with making false entries in books of account, means something more than that incorrect or untrue entries have been made, and it has been so held by the courts in the consideration of offenses of that character. The last edition of Bouvier's Law Dictionary says of the word "false," that when "applied to the intentional act of a responsible being, it implies a purpose to deceive." In Black's Law Dictionary, under the title "false," it is said: "In law, this word means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud." In a recent and well accepted publication called "Words and Phrases," the word "false" is thus defined:—"False means that which is not true, coupled with a lying intent." Wood v. The State, 48 Ga. 192, 297, 15 Am. Rep. 664. "False in juris-

prudence usually imports something more than the vernacular sense of 'erroneous' or 'untrue.' "

This and other citations in the petitioner's brief, establish a jurisprudential meaning to the word "false" at variance with that adopted by the learned judge of the court below.

No good reason has been suggested why Congress should have made such an exception to the character of the acts enumerated, as severally barring the discharge of the bankrupt, by using the word "false" in some other than its primary and obvious meaning.

But it is not without significance to inquire why an incorrect statement, innocently made to one creditor, should bar the discharge of the bankrupt as to all his other debts, whatever be its effect as to the debt of that particular creditor. In re Carton & Co., *supra,* the court says:

"It is the act of issuing a materially false statement and the fraudulent intent of the man who issues it, that the statute seeks to punish by refusing a discharge. It should not depend upon the whim or good nature of any particular creditor to whom the false statement was made, whether the offending bankrupt should be given or refused his discharge. Any 'party in interest' who chooses to bring the wrongful act to the attention of the court, and proves that it was wrong within the meaning of the statute, is entitled so to do."

We fully concur in the meaning thus attributed to the clause in question. The bankrupt who has made to a creditor, for the purpose of obtaining credit, a false statement,—that is, one intentionally and knowingly untrue, is unworthy of the privilege of a discharge under the act, and the court will act upon information brought to it of such an act by any party in interest. It will be at once conceded on all hands, that such a bankrupt is unworthy, and should not receive the favor accorded by the law to the honest but unfortunate debtor. Some of the cases cited by the appellee conflict with the view here stated, but the weight of authority, as of reason, supports it.

We think that the court below erred in finding that the word "false" means no more in clause 3 than "not true," and the order of the said court is hereby revised in matter of law, by directing that the first specification of grounds of opposition to the discharge of the bankrupt, filed by the Merchants' National Bank, be dismissed, and that the bankrupt receive his discharge

in accordance with the recommendation of the referee in that behalf.[2]

DIMOCK v. REVERE COPPER CO.

117 U. S. 559, 29 L. ed. 994

(United States Supreme Court. April 5, 1886)

This case came here by a writ of error to the Supreme Court of New York, having been decided in the Court of Appeals, and the record remitted to the Supreme Court that judgment might be finally entered there.

The action was brought in that court on a judgment in favor of the Revere Copper Company, plaintiff, against Anthony W. Dimock, rendered in the Superior Court of the Commonwealth of Massachusetts, for the county of Suffolk, on the 1st day of April, 1875.

The defendant, Dimock, pleaded, in bar in this action, a discharge in bankruptcy, by the District Court of the United States for the District of Massachusetts, rendered on the 26th day of March, 1875, five days before judgment in the State Court.

The case being submitted to the New York Supreme Court in special term, without a jury, that court found the following facts and conclusions of law thereon:

"As Findings of Fact.

"First. That the plaintiff is, and at the times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts.

"Second. That on or about the 13th day of January, 1874, the Revere Copper Company of Boston, Massachusetts, the plaintiff herein, commenced an action in the Superior Court of the Commonwealth of Massachusetts, within and for the county of Suffolk, a court of general jurisdiction, against Anthony W. Dimock, the defendant herein, by the issue of a writ of attachment against the goods, estate, and body of the said defendant, and which said writ was duly served on said defendant, and the summons to appear in said action was duly served upon him personally, and that the said defendant thereafter duly appeared in said action by attorney; that the cause of action was an indorsement of said Dimock of two promissory notes made in the

2—The principal case is annotated in 20 L. R. A. (N. S.) 1023.

city of New York to the order of plaintiff by the Atlantic Mail Steamship Company, and dated December 19, 1872.

"Third. That on or about June 23, 1874, the said defendant, Anthony W. Dimock, filed a petition in bankruptcy, and was duly adjudicated a bankrupt, in the District Court of the United States for the District of Massachusetts, and that such proceedings were thereafter had that, on or about March 26, 1875, the said Dimock was discharged from all debts and claims provable against his estate, and which existed on the 23d day of June, 1874.

"Fourth. That such proceedings were had in the aforesaid action in the Superior Court of the Commonwealth of Massachusetts that on or about April 1st, 1875, the plaintiff duly recovered judgment in said action against the defendant for the sum of three thousand five hundred and ninety-five dollars and fifteen cents ($3,595.15), and that said judgment was upon that day duly entered.

"Fifth. That no part of said judgment has been paid, and the whole thereof is now due and payable to the plaintiff."

"As Conclusions of Law.

"I. That the said proceedings in bankruptcy are no bar to the present action, and constitute no defense herein.

"II. That the plaintiff should have judgment against the defendant for the sum of three thousand five hundred and ninety-five dollars and fifteen cents ($3,595.15) with interest from April 1st, 1875, amounting to one thousand one hundred and forty-two dollars and ninety-six cents ($1,142.96), making in all four thousand seven hundred and thirty-eight dollars and eleven cents ($4,738.11), together with the costs of this action, to be taxed, and an allowance, in addition to costs, amounting to the sum of seventy-five dollars."

The judgment rendered on these findings was reversed by the Supreme Court in general term, and that judgment was in turn reversed by the Court of Appeals, which restored the judgment of the special term. 90 N. Y. 33.

Mr. Justice MILLER, after stating the facts as above reported, delivered the opinion of the court.

The only question considered at all these trials was whether the discharge of the defendant in the bankruptcy proceeding is, under the facts found by the court, a bar to the present action;

and, as the decision by the New York court against the plaintiff in error as to the effect of that order of discharge is to refuse to him a right claimed under the laws of the United States, this court has jurisdiction to review the decision.

The Superior Court of Massachusetts had jurisdiction of the suit of the Copper Company against Dimock, both as regards the subject-matter and the parties. This jurisdiction was rendered complete by service of process and by the appearance of the defendant. All this was before the beginning of the bankruptcy proceeding. Nothing was done to oust this jurisdiction, and the case accordingly proceeded in due order to the rendition of the judgment which is the foundation of this action. It is not argued that this judgment was void, or that the court was ousted of its jurisdiction by anything done in the bankruptcy court. No such argument could be sustained if it were made. In the case of Eyster v. Gaff, 91 U. S. 521, which was very similar to this on the point now before the court, it was said: "The court in that case had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might affect the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of the parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void." The court then goes on to show, that, if the assignee had brought his right, acquired *pendente lite*, to the notice of the court, it would have been protected. Hill v. Harding, 107 U. S. 631.

So here, if Dimock had brought his discharge to the attention of the Superior Court at any time before judgment, it would have been received as a bar to the action, and, under proper circumstances, even after judgment, it might be made the foundation for setting it aside and admitting the defense. Ray v. Wight, 119 Mass. 426; Page v. Cole, 123 Mass. 93; Golden v. Blaskopf, 126 Mass. 523. Nothing of the kind was attempted. The question before the Massachusetts court for decision, at the moment it rendered its judgment, was, whether Dimock was then indebted to the Copper Company. Of Dimock and of this ques-

tion it had complete jurisdiction, and it was bound to decide it on the evidence before it. Its decision was, therefore, conclusive, as much so as any judgment where the jurisdiction is complete. It concluded Mr. Dimock from ever denying that he was so indebted on that day, wherever that judgment was produced as evidence of the debt. If he had the means at that time to prove that the debt had been paid, released, or otherwise satisfied, and did not show it to the court, he cannot be permitted to do it in this suit; and the fact that the evidence that he did not then owe the debt was the discharge in bankruptcy, made five days before, does not differ from a payment and receipt in full or a release for a valuable consideration. Cromwell v. Sac County, 94 U. S. 351; also, Claflin v. Houseman, 93 U. S. 130, 134. A still stronger case of the validity of judgments of a State Court, in their relation to bankruptcy proceedings, had *pendente lite*, is that of Davis v. Friedlander, 104 U. S. 570. In the case of Thatcher v. Rockwell, 105 U. S. 467, 469, the Chief Justice, after alluding to these and other cases, says, they "establish the doctrine that, under the late bankrupt law, the validity of a pending suit, or of the judgment or decree thereon, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not he was equally bound with any other party acquiring an interest *pendente lite*."

It is said, however, that, though the defendant had his discharge before the judgment in the State Court was rendered, and might have successfully pleaded it in bar of that action and did not do so, the judgment now sued on is the same debt, and was one of the debts from which, by the terms of the bankrupt law, he was discharged under the order of the bankruptcy court, and to any attempt to enforce that judgment the discharge may be shown as a valid defense. That is to say, that the failure of the defendant to plead it when it was properly pleadable, when, if he ever intended to rely on it as a defense, he was bound to set it up, works him no prejudice because, though he has a dozen judgments rendered against him for this debt after he has received his discharge, he may at any time set it up as a defense when these judgments are sought to be enforced. Upon the same principle, if he had appeared in the State Court and pleaded his discharge in bar, and it had been overruled as a sufficient bar, he could, nevertheless in this action on that judgment, renew the defense.

But in such case, his remedy would not lie in renewing the struggle in a new suit on such judgment, but in bringing the first judgment for review before this court where his right under the discharge would have been enforced then, as he seeks to do it now, after submitting to that judgment without resistance and without complaint.

We are of opinion that, having in his hands a good defense at the time judgment was rendered against him, namely, the order of discharge, and having failed to present it to a court which had jurisdiction of his case and of all the defenses which he might have made, including this, the judgment is a valid judgment, and that the defense cannot be set up here in an action on that judgment. The case of Steward v. Green, 11 Paige, 535, seems directly in point. So also are Hollister v. Abbott, 11 Foster, 31 N. H. 442, and Bradford v. Rice, 102 Mass. 472.

It is clear that until the judgment of the Massachusetts court is set aside or annulled by some direct proceeding in that court, its effect cannot be defeated as a cause of action, when sued in another state, by pleading the discharge as a bar which might have been pleaded in the original action.

The judgment of the New York court is *affirmed*.[3]

3—"The execution was issued after the discharge in bankruptcy, and appellee filed his motion to quash on the ground that the judgment was a partnership debt of the firm of Munder & Stevenson. Testimony was introduced, over the objection of appellant, tending to prove that, though the notes upon which the judgment was rendered were signed individually, they were in fact obligations of the firm, and that the consideration therefor went to the firm. * * *

"The effect of the discharge in bankruptcy was to release the members of the firm individually and as partners from all the provable debts of the firm save those specially excepted by the terms of the statute, such as judgments in actions for fraud or false pretense, etc.

"The discharge is the judgment of a court of competent jurisdiction and cannot be collaterally attacked. Collier on Bankruptcy, p. 785; Black on Bankruptcy, p. 88; Loveland on Bankruptcy, p. 785; Fuller v. Pease, 144 Mass. 390; Corey v. Ripley, 57 Me. 69; Bailey v. Carruthers, 71 Me. 172; Howland v. Carson, 28 Ohio St., 625; Milhous v. Aicardi, 51 Ala. 594; Stevens v. Brown, 49 Miss. 597; Brady v. Brady, 71 Ga. 71; Talbott v. Suit, 68 Md. 443.

"It is contended by counsel for appellant that the discharge was not effective to release appellee from liability individually from the partnership debts because he failed to include his individual assets in the schedules. If it has been shown to the bankruptcy court that appellee owned property not included in the schedules, that would have been ground for refusal of the discharge, or for revocation of the discharge by that court after it had been granted; but that question should have been litigated in the bankruptcy court,

CITIZENS' LOAN ASS'N v. BOSTON & M. R. R.

196 Mass. 528, 82 N. E. 696

(Supreme Judicial Court of Massachusetts. Nov. 27, 1907)

Plaintiff and defendant are domestic corporations. On February 27, 1905, and for a long time prior thereto, Steven J. Wescott was in the employ of defendant as a conductor. On that day Wescott, for a valuable consideration, and as security for the payment of a note given by him to plaintiff, and for money loaned, assigned to plaintiff all claims which he might thereafter have against defendant for moneys becoming due between that date and January 1, 1908, for services.

RUGG, J. The single question presented by this appeal is whether an assignment of wages to be earned in an existing employment, given before bankruptcy, without fraud, and upon sufficient consideration, to secure a valid subsisting debt, and duly recorded, can be enforced, after the discharge in bankruptcy of the assignor, as to wages earned in the course of the original employment, by the creditor, who has not proved his debt in bankruptcy. A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay, is at an end.[4] The obligation itself is not canceled. Champion v. Buckingham, 165 Mass. 76, 42 N. E. 498; Heather v. Webb, 2 C. P. D. 1. An assignment of future earnings, which may accrue under an existing employment, is a valid contract and creates rights, which may be enforced both at law and in equity, whichever may in a particular case be the appropriate forum. Tripp v. Brownell, 12

and the judgment of that court in granting the discharge is conclusive of the right to contest it on that ground.

"The discharge operates only upon such debts as were provable, and the question whether or not a particular debt has been released by it is left to be determined by the court in which action is brought to enforce the debt. It was proper, therefore, for the court to enter upon an inquiry whether or not the debt in controversy was in fact a provable claim against the estate of the bankrupt and was discharged. Collier on Bankruptcy, p. 191; Loveland on Bankruptcy, p. 760; In re Rhutassel, 96 Fed. 597; In re Mussey, 99 Fed. 71; In re Wright, No. 18065, Fed. Cases." Young v. Stevenson, 73 Ark. 480, 482. See also Custard v. Wigderson, 130 Wis. 412.

4—*Cf.* Matthewson v. Needham, 81 Kans. 340, 26 L. R. A. (N. S.) 274.

Cush. 376; Weed v. Jewett, 2 Metc. 608, 37 Am. Dec. 115; Brackett v. Blake, 7 Metc. 335, 41 Am. Dec. 442; Hartey v. Tapley, 2 Gray, 565; Gardner v. Hoeg, 18 Pick. 168; Taylor v. Lynch, 5 Gray, 49; Lannan v. Smith, 7 Gray, 150; St. Johns v. Charles, 105 Mass. 262; Lazarus v. Swan, 147 Mass. 330, 333, 17 N. E. 665; James v. Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692. These cases proceed upon the theory that the worker under contract for service, though indefinite as to time and compensation and terminable at will, has an actual and real interest in wages to be earned in the future by virtue of his contract. He may recover for an unjustifiable interference with such an employment, as for an injury to any other vested property right. Morgan v. Dunphy, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; Berry v. Donovan, 188 Mass, 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499. It is plain that one may sell wool to be grown upon his own sheep, or a crop to be produced upon his own land, but not that to be grown or produced upon the sheep or land of another. No more can one assign wages, where there is no contract for service. Jones v. Richardson, 10 Metc. 481; Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357. But profitable employment is a reality. Wages to be earned by virtue of an existing employment are no more shadowy or insubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy or mere possibility, but a substance capable of grasp and delivery. It constitutes a present, existing, right of property, which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession. The transfer of this potential possession creates the assignee a lienor upon the property right. The holder of such an assignment stands upon a firmer plane than the mortgagee of future acquired property, who has only the right by contract to act betimes in the future for his protection. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959. The assignee of wages to be earned under an existing contract gets a present right, perfect in itself, requiring no future action on his part. Contracts for personal service are of such a character that their breach is in appropriate cases enjoined. Lumley v. Wagner, 1 De G., M. & G. 604; Duff v. Russell, 133 N. Y. 678, 31 N. E. 622; Whitwood Chemical Co. v. Hardman [1891] 2 Ch. 416. See Phila. Base Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227,

90 Am. St. Rep. 627. It may be taken for granted that the right to future wages to be earned under such a contract does not pass to the trustee in bankruptcy. Nor are we dealing here with a contract as to labor in terms or spirit contrary to public policy, as in Parsons v. Trask, 7 Gray, 473, 66 Am. Dec. 502. But on the contrary, assignments of wages are recognized as valid by statute. Rev. Laws, c. 189, §§ 32, 33, 34; Id. c. 102, §§ 51, 57 to 67, both inclusive; Id. c. 106, § 63. The present case is not affected by St. 1905, p. 224, c. 308, or St. 1906, p. 366, c. 390.

Specific performance of contracts to labor like that in question will not be enforced. Arthur v. Oakes, 63 Fed. 310-318, 11 C. C. A. 209, 25 L. R. A. 414; Robertson v. Baldwin, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. ed. 715. It is only where labor has been voluntarily performed that the question now presented can arise. It is possible that an agreement to execute an assignment, falling short of the creation of a lien, is, when the wages have been actually earned, enforceable in equity, even after a subsequent bankruptcy or insolvency. We do not decide this, however. Edwards v. Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; Stott v. Franey, 20 Or. 410, 26 Pac. 271, 23 Am. St. Rep. 132. At lowest the assignment in question became "a specific equitable lien on the fund" (Triste v. Child, 21 Wall. 441, 22 L. ed. 623), or was "an independent collateral agreement given by way of guaranty or other security" for the main debt, and there is no reason why such an agreement should not outlive the remedy upon the debt, to secure which it was given (Shaw v. Silloway, 145 Mass. 503, 507, 14 N. E. 783). In either event, it was not dissolved by the bankruptcy. We have considered the contrary authorities of In re West (D. C.) 128 Fed. 205, In re Home Discount Co. (D. C.) 147 Fed. 538, and Leitch v. Northern Pacific Ry. Co., 95 Minn. 35, 103 N. W. 704, with the deference to which they are entitled.[5] They proceed upon considerations as to the effect of an assignment of wages and the rights vesting thereunder in the assignee, as well as public policy pointed out in the latter case, which are inconsistent with what we conceive to be sound reasoning, and opposed to the numerous decisions of this court above cited concerning rights acquired under assignments of wages. In the absence of a decision to the same effect by the Supreme Court of the United

5—See also In re Ludeke, 171 Fed. 292; Levi v. Loevenhart & Co., 138 Ky. 133, 127 S. W. 748, 30 L. R. A. (N. S.) 375, 137 Am. St. Rep. 377.

States, we cannot accede to them as authoritative. Nor do we perceive anything inconsistent with the conclusion we have reached, in Clark v. Clark, 17 How. 315, 15 L. ed. 77, East Lewisburg v. Marsh, 91 Pa. 96, Christian & Craft Grocery Co. v. Michael & Lyons, 121 Ala. 84-87, 25 South. 571, 77 Am. St. Rep. 30, Williams v. Chambers, 10 Q. B. 337, and Hanover Nat. Bank v. Moyses, 186 U. S. 192, 22 Sup. Ct. 857, 46 L. ed. 1113, which are cited as generally supporting authorities In re Home Discount Co., *ubi supra.*

The assignment to the plaintiff is a lien which was preserved by § 67*d* of the bankruptcy act of July 1, 1898 (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3450]), and was not affected by the discharge in bankruptcy of the assignor. This conclusion is supported by Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233.

Judgment affirmed.[6]

EVANS v. STAALLE

88 Minn. 253, 92 N. W. 951

(Supreme Court of Minnesota. Jan. 9, 1903)

START, C. J. Action in the District Court of the county of Murray to enforce a resulting trust in favor of the plaintiff as a creditor of the defendant's husband, Christ Staalle, hereafter designated as the "debtor." The facts, in brief, as established by the verdict of the jury and the findings of the trial judge, are substantially these: In the year 1892 the debtor was indebted to the plaintiff in the aggregate sum of $117.25, and on November 11, 1897, the plaintiff duly recovered and docketed a judgment against him therefor in the sum of $224.17, including interest and costs. On March 19, 1901, execution was duly issued on the judgment, and returned wholly unsatisfied. On November 28 and December 19, 1900, respectively, land aggregating 160 acres, being the two tracts of 80 acres each described in the complaint, was conveyed to the defendant by the then owners thereof. The debtor paid one-third of the consideration for the conveyance of such tracts of land, and the title was taken in the name of the defendant as grantee to hinder and defraud the creditors of the debtor. This action was commenced in

6—See note to principal case in 14 L. R. A. (N. S.) 1025.

April, 1901, and the complaint alleged, with others, the facts we have stated. The answer of the defendant to the complaint admitted that the tracts of land described in the complaint were conveyed to her at the dates stated in the complaint, and denied the other allegations thereof. On April 6, 1902, the defendant moved the court for leave to serve an amended and supplemental answer, setting up the fact that on November 16, 1901, the debtor, Christ Staalle, was discharged in bankruptcy from all of his debts existing on January 19, 1901, on which day he filed his petition for adjudication under the act of congress relating to bankruptcy. The motion was denied, and the trial proceeded upon the original pleadings. The trial court, as a conclusion of law, directed judgment in favor of the plaintiff to the effect that the defendant holds the title to an undivided one-third of the two tracts of land here in question in trust for the plaintiff to the amount of his judgment, which is a lien thereon, and, further, that the plaintiff is entitled to a lien on a third tract of land to the extent of $51.92, as to which it is unnecessary to state the facts. Judgment was so entered, from which the defendant appealed.

1. The first assignment of error to be considered is that the complaint does not allege facts constituting a cause of action, because it does not state that the debtor was ever the owner of any interest in the land in question, nor that he was ever the owner of any of the consideration paid therefor, nor any facts tending to show any intention to defraud any of his creditors, or that any of them were defrauded. No one of these objections to the complaint is well taken. The complaint alleges that the land in question was conveyed to the defendant, and that the purchase price thereof was paid by the judgment debtor, and the title thereto taken in the name of the defendant to defraud creditors. Upon these facts there presumptively arose a trust in favor of the creditors of the debtor at the time such conveyance was made. It was only necessary to allege such facts in the complaint. Gen. St. 1894, § 4281; Rogers v. McCauley, 22 Minn. 384. It was sufficient to allege in the complaint that the debtor paid the purchase price, without also alleging that he was the owner thereof. The legal title to the land was vested in the defendant by the conveyance to her, and no interest or trust in the land resulted in favor of the debtor by reason of his paying part of the purchase price or otherwise. Subject to the trust in favor of then existing creditors, the defendant became, by the

conveyance, the absolute owner of the land. Gen. St. 1894, § 4281. Such being the effect of the conveyance to the defendant, it would have been absurdly untrue to have alleged in the complaint that the debtor had some interest in the land.

2. The order of the court denying the defendant's motion to file a supplemental answer pleading the debtor's discharge in bankruptcy is urged as error. The trial court, in the exercise of a fair discretion, might well have denied the motion on the ground that it was not made with reasonable promptness. But, this aside, the order was right on the merits, for the debtor's discharge was immaterial. No title to the land passed to the trustee in bankruptcy. The discharge in bankruptcy did not pay or extinguish the plaintiff's debt, nor relieve the defendant's land from the trust with which it was charged by operation of law for the payment of the debt. The only effect of the discharge was to relieve the debtor from all legal obligations to pay the debt, leaving all liens or trusts securing the debt unimpaired. Lowell, Bankr. §§ 242-244; Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917. Now, when the land in this case was conveyed to the defendant upon a consideration paid by the debtor, a trust in favor of the plaintiff as a creditor attached to the land to the extent necessary to satisfy his debt, which could be defeated only by disproving any fraudulent intent. This trust could be enforced after the debtor's discharge, although all personal remedies against him to secure payment of the debt had been thereby extinguished, precisely the same as a mortgagee may foreclose his lien on the mortgaged premises, and thereby secure payment of his debt, although an action to recover it from the mortgagor be barred by the statute of limitations. Slingerland v. Sherer, 46 Minn. 422, 49 N. W. 237.

* * *

Judgment affirmed.

BROWN & BROWN COAL CO. v. ANTEZAK

164 Mich. 110, 128 N. W. 774

(Supreme Court of Michigan. Dec. 7, 1910)

This action was commenced by attachment in the justices' court of Detroit, December 30, 1907. On January 2, 1908, the attached property was released upon the giving of the statutory bond. On February 8, 1908, judgment was rendered in favor

of the plaintiff for $405.94 and costs. On March 2, 1908, an appeal was taken to the Circuit Court for the county of Wayne. In perfecting the appeal the usual statutory bond was given; one John Knuth becoming surety thereon. While said appeal was pending and 13 months after it was taken, the defendant, on April 7, 1909, filed a voluntary petition in bankruptcy in the United States District Court. On July 16, 1909, the appeal not having been prosecuted or determined, plaintiff made a motion to dismiss. On July 26, 1909, defendant secured an order staying proceedings in the Wayne Circuit Court until the final determination of the bankruptcy proceedings in the United States District Court. In the bankruptcy proceeding the judgment here in question was listed as a liability of the bankrupt, and a final discharge was by him obtained on September 21, 1909. On October 4, 1909, defendant filed an amended plea, giving notice of his discharge, and on December 10, 1909, the case came on for trial in the Wayne Circuit Court. No defense upon the merits was interposed by defendant, but it was urged in his behalf that his discharge in the bankruptcy proceeding operated, not only to cancel his indebtedness to plaintiff, but likewise released the surety upon the appeal bond. It was conceded upon the trial that, unless the discharge of defendant released the surety, plaintiff was entitled to a judgment for the amount of the judgment in the justice court, with interest. There being no question of fact involved, by consent of counsel, the case was tried by the court without a jury. A verdict was directed for defendant, upon which judgment was entered. Plaintiff has removed the case to this court by writ of error.

BROOKE, J. (after stating the facts as above). From the foregoing statement of facts, it will be seen that the only question to be determined is whether or not the discharge which defendant obtained in the bankruptcy proceedings operates as a bar to the taking of a judgment against his surety upon the appeal bond. The obligation of the bond is as follows: "Whereas, judgment was rendered on the 26th day of February, A. D. 1908, by Louis Ott, one of the justices of the peace in and for the county of Wayne, in favor of the above-named Brown & Brown Coal Company, as plaintiff, and against the above-bounden Stanislaus Antezak, as defendant, for the sum of 405.94 dollars, damages, and 3.00 dollars, costs of suit, and whereas the above-bounden Stanislaus Antezak, conceiving him-

self aggrieved by said judgment, has appealed therefrom to the Circuit Court for the county of Wayne: Now, therefore, the condition of the above obligation is such, that if the above-bounden Stanislaus Antezak shall prosecute his said appeal with all due diligence to a decision in the said Circuit Court, and if a judgment be rendered against him in the said Circuit Court, shall pay the amount of such judgment, including all the costs, with interest thereon, and in case the said appeal shall be discontinued or dismissed, if the said Stanislaus Antezak shall pay the amount of said judgment rendered against him in said justice court, including all costs with interest thereon, then this obligation to be void, otherwise in force. [Signed] Stanislaus Antezak. [Seal.] [Signed] John Knuth. [Seal.]"

§ 16, National Bankruptcy Law 1898, provides: "The liability of a person, who is a co-debtor with or guarantor or in any manner, a surety for a bankrupt, shall not be altered by the discharge of such bankrupt." Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428).

This identical question was considered in the case of Knapp v. Anderson, 15 N. B. R. 316. The language of the bankrupt act of 1867 is, in effect, the same as that of the act of 1898 above quoted. Act March 2, 1867, c. 176, § 33, 14 Stat. 533. The court, after discussing the obligation of an indorser, said: "So with the surety. He agrees to pay if the event happens which matures his obligation to pay. He assumes to pay, and incurs the obligation to do so, which may become absolute. The design of an undertaking and the effect of it are proper matters of consideration on the question. The undertaking stays all proceedings, and the effect is to prevent the creditor from enforcing his judgment by execution, and in that mode obtaining his debt out of the property of his debtor. The sureties in the undertaking prevent him from availing himself of this right and opportunity, to which he is entitled by the law of the land and by his superior diligence. This right can be destroyed in all cases if the debtor, by appeal, and by subsequent proceedings in bankruptcy before a judgment of affirmance, can release himself and his sureties as well. It was doubtless to prevent such and kindred results that the law declared the discharge should not release or affect any person liable for the same debt for or with the bankrupt, either as partner, contractor, indorser, surety, or otherwise. It is a personal relief given to the applicant, or forced upon him, and not to those equally bound with him to

answer his creditor. * * * A surety is rarely primarily liable. His obligation usually depends upon a contingency, which is either an event to occur, or the failure of the principal to pay or to do the act required."

In Holyoke v. Adams, 10 N. B. R. 270, it was held that a discharge in bankruptcy did not release the sureties upon a bond given in attachment proceedings, commenced more than four months before the bankruptcy proceedings were launched.

The case of In re Wm. Albrecht, 17 N. B. R. 287, Fed. Cas. No. 145, arose in Michigan, and the opinion was written by Judge Brown, later Justice of the United States Supreme Court. In that case, the authorities are reviewed, and the conflict between them is noted. The court concludes: "I deem it inconsistent with the general purpose of the act to hold that the lien of the creditor, lawfully acquired by his diligence, shall be lost by the debtor giving a bond to satisfy the judgment, an action entirely beyond the control of the creditor, and one which was designed to secure, not to defeat, the ultimate payment of the debt. * * * But under the construction given by the Massachusetts courts, the preference of the attaching creditor is lost, if the debtor is sufficiently responsible to obtain a bond, while it is preserved, if his situation is so desperate as to make the release of the property impossible."

In Hill v. Harding, 107 U. S. 631, 2 Sup. Ct. 404, 27 L. ed. 493, Mr. Justice Gray, speaking for the court, said: "The stay does not operate as a bar to the action, but only as a suspension of proceedings until the question of the bankrupt's discharge shall have been determined in the United States Court sitting in bankruptcy. After the determination of that question in that court, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require. If the discharge is refused, the plaintiff, upon establishing his claim, may obtain a general judgment If the discharge is granted, the court in which the suit is pending may then determine whether the plaintiff is entitled to a special judgment for the purpose of enforcing an attachment made more than four months before the commencement of the proceedings in bankruptcy, or for the purpose of charging sureties upon a bond given to dissolve such an attachment." This case was again before the United States Supreme Court (130 U. S. 699, 9 Sup. Ct. 725, 32 L. ed. 1083), where it said: "If the bond was executed before the commencement of proceedings in bank-

ruptcy, the discharge of the bankrupt protects him from liability to the obligees, so that, in an action on the bond against him and his sureties, any judgment recovered by the plaintiffs must be accompanied with a perpetual stay of execution against him; but his discharge does not prevent that judgment from being rendered generally against them"—citing Wolf v. Stix, 99 U. S. 1, 25 L. ed. 309.

A very well considered case involving the question in dispute will be found in Fisse v. Einstein, 5 Mo. App. 78. After discussing the Massachusetts decisions and those of some other states to the contrary, the court says: "To hold that the surety in this appeal is to be released because there can be no formal entry of judgment against his principal in the Appellate Court, though there is a solemn admission in that court of the perfect correctness and justice of the judgment from which this appeal is taken, is to denaturalize the transaction, and to give an interpretation to the appeal bond quite foreign to its scope and meaning. It is to say that the surety, whilst engaging to pay the judgment appealed from if the judgment debtor becomes insolvent, is to be released merely because the judgment debtor becomes insolvent. * * * The insolvency of the principal is the very contingency against which the appeal bond was intended to provide." See, also, Farrell v. Finch, 40 Ohio St. 337; Cyc. vol. 5, p. 401, and cases cited.

We do not overlook the fact that several states, notably Massachusetts (see Carpenter v. Turrell, 100 Mass. 452, and Hamilton v. Bryant, 114 Mass. 543), have given a different construction to the statute. This is, however, a federal statute, and we are of opinion that the construction it has received in the federal courts should control, if that construction is not inconsistent with our own decisions and is, as we believe it to be, in accordance with the principles of justice.

It is urged that no federal question is involved. While in one sense that may be true, yet, under the record as it stands, the only obstacle to the recovery of a judgment by the plaintiff against both principal and surety is the fact that a federal law says that under a certain contingency (which has arisen) the principal is relieved from the debt. That same law, in terms, and as construed by the federal courts, says that the release of the principal shall not operate to discharge his surety. Nor is this construction one which is unduly harsh as to the surety. In signing the obligation, he may be presumed to have had in mind

the contingency that his principal might become bankrupt, thus making the surety's liability upon the bond certain.

We have not heretofore discussed the conditions of the bond itself. The first condition is: "That if the above-bounden Stanislaus Antezak shall prosecute his said appeal with all due diligence to a decision in the said Circuit Court," etc. Now, did the principal comply with this condition of his bond? Instead of prosecuting his appeal, he voluntarily sought relief through bankruptcy in the Federal Court, and interposed that proceeding first for the purpose of securing a stay of proceedings, and finally as an absolute bar to a recovery These acts are clearly inconsistent with his obligation as expressed in the bond. Whether or not they constitute such a breach thereof as would render the surety liable we do not decide, for, in our view of the decisions, the liability of the surety would remain the same even though the bankruptcy were involuntary.

Our attention is called to the case of Bryant v. Kinyon, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801. We there held that a discharge in bankruptcy released the surety upon a capias bond. The condition of that bond is that the principal "shall pay the costs and condemnation of the court or render himself into the custody of the sheriff," etc.

The right of the surety to surrender his principal extends eight days from the commencement of suit on the recognizance, after the timely and regular issue and return "not found" of a body execution. If the debt for which the original suit was brought is extinguished by the bankruptcy proceeding, no body execution can ever issue, and the contingency which fixes the liability of the surety can never arise. The case at bar does not present this difficulty. Here, as stated by the United States Supreme Court, a judgment may issue against the principal accompanied by a perpetual stay of execution, and the surety may be compelled to answer according to the terms of his obligation.

The judgment is reversed, and a new trial ordered.[7]

7—On motion to amend judgment the court amended the opinion to read as follows: "The judgment is reversed, and the case is remanded to the circuit court, where judgment will be entered for the plaintiff in the amount of the judgment in the justice's court, with interest." 164 Mich. 116, 130 N. W. 305.

BLUTHENTHAL v. JONES

208 U. S. 64, 52 L. ed. 390, 28 Sup. Ct. 192

(United States Supreme Court. January 6, 1908)

Mr. Justice MOODY delivered the opinion of the court:

This is a writ of error to the Supreme Court of the state of Florida. The plaintiffs in error were judgment creditors of Miles C. Jones, the intestate of the defendant in error. The creditors sought to enforce the judgment by a levy of execution. The question in the case is whether Jones was discharged from the debt by a discharge in bankruptcy granted to him on November 7, 1903, by the District Court for the southern district of Florida, on proceedings which were begun on August 3, 1903. The debt was one provable in the bankruptcy proceeding, and, it is conceded, would be barred by the discharge, were it not that there had been a prior proceeding in bankruptcy in another district court, which, it is contended, had the effect of exempting the debt from the operation of the discharge. In the year 1900, Jones filed his petition in bankruptcy in the District Court for the southern district of Georgia. Bluthenthal & Bickart, the plaintiffs in error, objected to the discharge in that proceeding, and it was refused on December 3, 1900. Bluthenthal & Bickart, at the time of the first proceeding, were creditors of Jones in respect of what may be assumed, for the purposes of this case, to be the same indebtedness now in question. The ground of the refusal does not appear. It may be assumed to have been, however, one of the two grounds specified in § 14 of the bankruptcy act [30 Stat. at L. 550, c. 541, U. S. Comp. Stat. 1901, p. 3427] before it was amended by the act of February 5, 1903 [32 Stat. at L. 797, c. 487, U. S. Comp. Stat. Supp. 1907, p. 1026]; that is to say, either that the bankrupt has committed an offense punishable by imprisonment, or, with fraudulent intent and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of accounts. Though Bluthenthal & Bickart were notified of the proceedings on the second petition for bankruptcy and their debt was scheduled, they did not prove their claim or participate in any way in those proceedings. They now claim that their debt was not affected by the discharge on account of the adjudication in the previous proceedings.

§ 1 of the bankruptcy act defines a discharge as "the release of a bankrupt from all of his debts which are provable in bank-

ruptcy, except such as are excepted by this act." § 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court shall discharge the bankrupt, unless he has committed one of the six acts specified in that section. § 17 of the amended act provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with four specified exceptions, which do not cover this case. The discharge appears to have been regularly granted, and, as the debt due to Bluthenthal & Bickert is not one of the debts which, by the terms of the statute, are excepted from its operation, on the face of the statute the bankrupt was discharged from the debt due to them. There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the southern district of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in § 14 of the bankruptcy act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection.

Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida, and was not one of the debts exempted by the statute from the

operation of the discharge, it was barred by that discharge. The Supreme Court of the State of Florida so held, and its judgment must be affirmed.

HARGADINE-McKITTRICK DRY GOODS CO. v. HUDSON

122 Fed. 232, 58 C. C. A. 596

(Circuit Court of Appeals, Eighth Circuit. March 23, 1903)

On the 31st day of December, 1901, the Hargadine-McKittrick Dry Goods Company, plaintiff in error, brought this action at law [in the Circuit Court of the United States for the eastern district of Missouri] against John Robert Hudson, the defendant in error, founded on the record of a judgment recovered by the plaintiff against the defendant in the District Court of Burnett county, Tex., on the 10th day of April, 1891, for the sum of $10,939.92. The defendant answered, admitting the recovery of the judgment, and setting up these defenses: (1) That, being a resident and citizen of the state of Colorado, he was on the 29th day of January, 1900, duly adjudged a bankrupt by the United States District Court for the District of Colorado, and that on the 17th day of April, 1900, he was duly discharged as a bankrupt by the order of that court from the payment of all debts provable against his estate on the 26th day of January, 1900; (2) that the plaintiff, prior to the 11th day of August, 1900, appeared before the referee in bankruptcy having charge of the defendant's estate in bankruptcy, and filed for allowance against the defendant's estate a claim founded on the identical judgment sued on in this action, which claim was, upon due hearing and consideration, disallowed by the referee, and that the plaintiff filed a petition for a review of the order and judgment of the referee by the United States District Court for the District of Colorado, whereupon the referee, on the petition of the plaintiff, duly certified the claim and his ruling thereon to the District Court for review, and upon full hearing and consideration that court, on the 25th day of February, 1901, confirmed the ruling of the referee and entered judgment disallowing the plaintiff's claim based on the judgment. The plaintiff's replication admits that it filed for allowance against the estate of the bankrupt its claim, based on the judgment in suit, and that the same was disallowed by the referee, and upon review was also disallowed by the District Court; but it alleges the ruling of the

referee in the cause, and the judgment of the District Court affirming the referee's ruling, proceeded upon the ground that the plaintiff's cause of action on the judgment was barred by the statute of limitations of the state of Colorado, and avers that it was not barred by the statute of limitations of the state of Texas, wherein the judgment was rendered, or of the state of Missouri. The replication further set up that the debt which was the foundation of the judgment sued on was created by fraud. On motion of the defendant the portions of the replication which we have epitomized were stricken out; the "motion to strike" seemingly performing the office of a demurrer. By agreement of the parties a jury was waived, and the cause tried before the court, which made a general finding in favor of the defendant and rendered judgment (C. C.; 111 Fed. 361), accordingly, and the plaintiff sued out this writ of error.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff having voluntarily gone into the bankrupt court, and submitted itself to the jurisdiction of that court, and filed its claim against the bankrupt's estate founded on the judgment here in suit, and that court having disallowed the claim and entered judgment accordingly, and that judgment remaining in full force and virtue, constitutes a complete bar to this action. It is not material upon what ground that court rested its judgment. It unquestionably had jurisdiction of the parties and the subject-matter, and, if either party conceived its judgment was for any reason erroneous, the remedy was by appeal, and not by a suit on the same cause of action in another jurisdiction against the bankrupt.

But if, as is claimed by the plaintiff in error, the United States District Court for the District of Colorado disallowed the claim upon the ground that it was barred by the statute of limitations of that state, that court committed no error in so doing. The bankrupt was a resident and citizen of the state of Colorado. If he had been sued on the record of the judgment here in suit before he was adjudged a bankrupt, either in the state or United States Court in Colorado, he could have successfully interposed the statute of limitations of that state as a defense to the action. And when he was adjudged a bankrupt, and the plaintiff filed its claim before the referee, it was open to that officer in like manner to interpose the statute of limitations of the state of

Colorado as a defense to the claim. There is no support in reason or authority for the contention that no debt barred by the statute of limitations of the state where the bankruptcy proceeding is pending is provable in bankruptcy, or discharged by a discharge in bankruptcy, if by the laws of any other state the debt would not be barred. For the purposes of the administration and settlement of the bankrupt's estate, and determining its liabilities, the statute of limitations of the state where the bankrupt proceedings are pending is applicable, and is the statute of limitations by which the rights of creditors must be determined.

It comes to this: Can the trustee in bankruptcy plead the statute of limitations to a claim against the bankrupt's estate that was barred by the law of the state of the bankrupt's residence before he was adjudged a bankrupt? It is clear the trustee cannot plead the statute of limitations of any other state, and, if he cannot plead the statute of the state in which the debtor resided and was adjudged a bankrupt, then there is no bar to claims against a bankrupt's estate. The statute of limitations of the state of the bankrupt's residence, and in which he was adjudged a bankrupt, like the exemption laws of the state, governs and determines the rights of creditors in the administration of the bankrupt's estate. So far forth as relates to the statute of limitations, the rights of a creditor of the bankrupt are not in any manner changed or abridged by allowing the trustee in bankruptcy to plead in bar of the creditor's claim the very same statute of limitations that the bankrupt himself could have successfully pleaded, if an action on the claim had been brought against him before he was adjudged a bankrupt.

The judgment of the District Court against the plaintiff on the plea of the statute of limitations is as effectual for all purposes as if it had been rendered on a plea of payment. The plaintiff's claim was barred before the adjudication in bankruptcy, and we have no occasion, therefore, to inquire whether the statute would continue to run after the adjudication and the appointment of the trustee. Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864; McDonald v. State of Nebraska, 41 C. C. A. 278, 101 Fed. 171.

But it is contended that the debts of the bankrupt, barred by the statute of limitations of the state in which he was adjudged a bankrupt, are not provable debts, and are not, therefore, affected by the bankrupt's discharge. This is rather a startling

proposition. We are not surprised that no authorities are cited to support it. If this were the law, it would result in this curious anomaly: that, while all recent and live debts of the bankrupt would be discharged, no outlawed debts would be discharged, because they could not have been successfully proved if the trustee had chosen to plead the statute of limitations. This would be giving to stale and outlawed claims a preference over live debts, and would leave the creditors free to sue and recover on these outlawed claims in any jurisdiction where the bankrupt could not for any reason successfully plead the statute of limitations, which is precisely what the plaintiff is seeking to do in this case.

Debts are not the less provable, within the meaning of the bankrupt act, because the statute of limitations may be successfully pleaded against their allowance. As well say that a debt was not suable because the statute of limitations might be pleaded to an action upon it. The plaintiff's judgment was a provable debt, and the fact that a recovery upon it might be defeated by the plea of payment, or a plea of the statute of limitations, or any other plea in bar, did not take it out of the class of provable debts. The term "provable debts" does not mean only such debts as are valid, and against the allowance of which no defense can be successfully interposed.

A discharge in bankruptcy, that discharges the debts of the bankrupt in one state, discharges them in all the states. The Constitution of the United States empowers Congress to establish "uniform laws on the subject of bankruptcies throughout the United States." The very purpose of a national bankrupt act is to give force and effect to the proceedings in bankruptcy, including the bankrupt's discharge, "throughout the United States." Its efficacy is not dependent on the varying statute of limitations of the several states.

The allegation in the replication that the debt which was the foundation of the judgment sued on was created by fraud is unavailing. Whether, after suing and recovering judgment on its promissory notes, and afterwards suing the bankrupt's estate in the bankrupt court on the record of that judgment, and afterwards bringing this action on the same record, it is now open to the plaintiff to say the original debt was created by fraud, we do not stop to consider. The provision of the present bankrupt law applicable to the point now under consideration is as follows:

"§ 17a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts except * * * (2) judgments in actions for frauds. * * *"

By this provision it is only "judgments in actions for frauds" that are excepted from the operation of a discharge. The judgment here sued on was rendered on promissory notes, and no suggestion of fraud was ever made or heard of until the filing of the replication in this case, more than 11 years after the giving of the notes, and more than 10 years after the rendition of the judgment thereon.

Decisions construing the bankrupt act of 1867 (Act March 2, 1867, c. 176; 14 Stat. 517) have no application to the present act on this subject. The language of that act was: "No debt created by fraud. * * *" This act left the question of fraud in the creation of the debt open to inquiry after the bankrupt obtained his discharge, and proved to be a fruitful source of bitter and protracted litigation. In the light of that experience Congress has limited the exception to "judgments in actions for frauds." This language leaves no room for construction. It is as plain as the English language can make it.

The judgment of the Circuit Court is affirmed.

SANTA ROSA BANK v. WHITE et al.

139 Cal. 703, 73 Pac. 577

(Supreme Court of California. Aug. 4, 1903)

SMITH, C. This is a suit on a promissory note of the appellant and the other defendants for the sum of $3,675.53, with interest, etc. The plaintiff had judgment, from which, and from an order denying the appellant defendant's motion for a new trial, the appeal is taken.

The defense is a discharge of the defendant in bankruptcy, under the act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]. The effect of this was to "release" the defendant "from all of his provable debts," with the exceptions named in § 17 of the act, c. 541, 30 Stat. 550, [U. S. Comp. St. 1901, p. 3428], which, so far as material, reads as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had

notice or actual knowledge of the proceedings in bankruptcy." It was held by the court, in effect, that the debt sued on comes within the exception stated. The contrary is claimed by the appellant, for the reason, among others, that it appears from the evidence that the plaintiff's debt was not known to him when he prepared his schedules, or until after his discharge, which was more than a year after the adjudication of bankruptcy. The only evidence on this point is the defendant's own testimony. But his explanation of the matter is not unreasonable, and, as there is no finding on the point, it must be assumed that the court regarded the question as immaterial; which, indeed, is the ground now taken by respondent's counsel. It will be assumed, therefore, that the fact is as stated by appellant in his testimony. The question involved is therefore purely one of construction, and may be thus stated: Does the exception cited include all debts not scheduled, whether known or unknown to the bankrupt, or only such as were known to him? The question is not without difficulty, but the grammatical structure of the provision seems to require the former construction, and we see nothing in the terms of the provision or in the other provisions of the act, whether considered in themselves or in connection with the former law, to indicate a different intention. Sutherland on Stat. Cons. § 267; Broom's Leg. Max. 652. Under the former law, the omission of a debt from the schedule, whether intentionally or otherwise, did not affect the validity of the discharge (Rev. St. § 5119); and the effect of the new provision is simply to establish a different rule. In the only cases involving this provision we have been able to find, the question now presented was not involved, nor do they seem to throw any light upon it. Tyrrel v. Hammerstein (Sup.) 67 N. Y. Supp. 717; Collins v. McWalters (Sup.) 72 N. Y. Supp. 203; In re Rhutassel (D. C.) 96 Fed. 597.

The other contentions of the appellant are more obviously untenable. They are: (1) That the provision in question is to be construed as requiring only constructive notice to the creditor to exclude him from the exception; (2) that the evidence did not justify the finding that plaintiff did not have actual notice; (3) that the plaintiff was at liberty to present his claim for proof and allowance when he discovered the pendency of the bankruptcy proceedings, which was more than a year after the adjudication of bankruptcy; and (4) that the plaintiff's claim as to the effect of the defendant's discharge constituted a collateral

attack on the decree, which was inadmissible. But as to the first contention, we think it clear that in the expression "notice or actual knowledge" the latter term is used as explanatory of the former, and that actual knowledge is required in order to exclude the creditor from the exception (Collins v. McWalters [Sup.] 72 N. Y. Supp. 205); and as to the second, the evidence, we think, was sufficient to justify the findings. The third contention is disposed of by the express provisions of § 57, subd. 2, of the act of July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], and the fourth by those of § 17, which expressly except the debts specified from the effect of the decree. In the corresponding provision of the Revised Statutes (§ 5119) there was a similar provision as to the effect of the discharge, with exceptions stated, and it was held that as to the plea of discharge the exception might be shown in a collateral action (Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. ed. 723); and the same has been held with reference to the existing act (Gee v. Gee, 84 Minn. 384, 87 N. W. 1116, In re Rhutassel [D. C.] 96 Fed. 597). The numerous cases cited by appellant's counsel refer to other provisions of the former act and to other questions.

We advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.[8]

THOMPSON v. JUDY

169 Fed. 553, 95 C. C. A. 51

(Circuit Court of Appeals, Sixth Circuit. April 19, 1909)

SEVERENS, Circuit Judge. On March 30, 1907, J. D. McClintock obtained a judgment in the Circuit Court of Bourbon county, Ky., against Wyatt A. Thompson for $1,500, damages for a false and malicious libel published in a newspaper by the defendant and others in April, 1906. On June 24, 1907, Thompson filed his voluntary petition in bankruptcy in the United States District Court for the Eastern District of Kentucky, and listed the said claim of J. D. McClintock as one of his liabilities. Mc-

8—See Birkett v. Columbia Bank, 195 U. S. 345.

Clintock afterwards proved his claim in the case. On October 8, 1907, Thompson received his discharge in bankruptcy. On October 14, 1907, a writ of *capias ad satisfaciendum* was issued from the Bourbon Circuit Court, and was executed on October 22, 1907, by the arrest of said Thompson, who was delivered into the custody of George W. Judy, jailer of Bourbon county. On October 23, 1907, Thompson filed his petition in the United States Circuit Court for the Eastern District of Kentucky for a writ of *habeas corpus* on the ground that the indebtedness upon which the *capias* was issued, namely, the judgment for damages for libel, had been discharged in bankruptcy. The writ was issued against Judy, the jailer of Bourbon county, and the petitioner was admitted to bail. Thereafter Judy filed his response, setting forth the proceedings in the Circuit Court of Bourbon county, and on final hearing Judge Cochran, who was presiding in the court below, held that the judgment in question was not discharged by proceedings in bankruptcy, and ordered that the petition for *habeas corpus* be dismissed and the petitioner be remanded to the state custody. From that order this appeal is taken.

The sole question in the case is whether the proceedings in bankruptcy operated to discharge the liability of the petitioner, which was the foundation of the judgment of the Bourbon Circuit Court, and the solution of it depends upon the construction of § 17 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), which is as follows:

"§ 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation); (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The foregoing is § 17 of the act as amended by Act Feb. 5,

1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026). That part of clause 2 which excepts from the operation of the discharge "liabilities" for willful and malicious injuries to the person or property of another is the provision here involved. That clause in the original act was the same, except that instead of the word "liabilities" the word "judgments" was employed. And the matter in dispute is, What was the consequence of the amendment which substituted "liabilities" for "judgments"?

Before the amendment, a liability for such a cause was not excepted unless it had been reduced to judgment. By the amendment it is excepted without being reduced to judgment. The contention of the appellant is that when a judgment has been obtained the liability is merged therein, and the claim no longer adheres to the liability, but is transmuted into another species of right, which was excepted by the original act, but, since the amendment, is no longer excepted. But notwithstanding the ingenuity of the argument by which this contention is sought to be maintained, we are of opinion that the intention of Congress was to declare that such liability should be excepted whether a judgment had been rendered upon it or not. The general doctrine of merger of the cause of action by judgment cannot, of course, be disputed. No suit or proceeding can thereafter be brought upon the original liability, but only for the enforcement of the judgment. The power of the court cannot be again invoked to adjudicate the question of liability. It is for the interest of the public that litigation shall come to an end, and the inconvenience of preserving the original liability as a continuing cause of action would be great. The pursuit must proceed along the line adopted, and the satisfaction of the claim must be sought through the judgment. But this rule of law prevails only to the extent that the reason for it exists. It does not prevent the recognition in the judgment of the attributes of the original cause of action. For the purposes of relief, the judgment embodies those attributes and gives ground for their enforcement. The rights of the parties are established, and are in no wise diminished thereby. So, when the judgment is general in form, it is often necessary to go behind it and see upon what liability it is founded, to the end that the characteristics of the cause of action may be impressed upon it. Such instances will recur to the mind of every lawyer. Indeed, Congress required this in this identical act when it excepted judgments for the par-

ticular causes of action mentioned in clause 2 of § 17. Now, we cannot resist the impression that Congress in making this amendment was looking to the substantial nature of the liability, and regarded the question as to whether a judgment had been rendered upon it as immaterial, that its intrinsic nature had not been altered and was in reality the cause of action intended by the original exception, and that Congress meant to protect that from the discharge. Apparently the requirement in the original act that the claim should have been reduced to judgment was intended to obviate the delay which a proceeding in the bankruptcy court for the liquidation of the damages would involve. And, finally, it would seem that in plain English a judgment on such a cause of action is a "liability" therefor.

But the appellant raises another question, which is whether a willful and malicious libel is an injury "to the person or property of another," and argues that by this language is meant a physical injury to his person, and not merely an injury to a right which the law attaches to the person. The question is therefore one of construction. It is true that in modern parlance the words "personal injury" are often used to designate a physical injury to the party. But usually, when there is any attempt to put the matter into legal phraseology, these and equivalent words are understood to import the meaning in which they have long been used by recognized authorities, whether in legal text-books and commentaries or precise definition by courts, in classifying the rights of individuals. In 1 Blackstone's Com. 129 *et seq.*, the author classifies and distinguishes those rights which are annexed to the person, *jura personarum,* and acquired rights in external objects, *jura rerum;* and in the former he includes personal security, which consists "in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." And he makes the corresponding classification of remedies. The idea expressed is that a man's reputation is a part of himself, as his body and his limbs are, and that detraction of it is an injury to his personality, and Chancellor Kent in his twenty-fourth lecture shows that the same classification of rights was expressed in our colonial legislation and has always been observed, and on p. * 16 of the second volume of his Commentaries, he says:

"As a part of the rights of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of

modern nations, made private reputation one of the objects of their protection."

The reasonable presumption is that Congress, being engaged in framing a statute so much requiring precision of terms, expected its language to be interpreted by long-settled usage in legal nomenclature. We shall not particularly refer to the many decisions of courts where this subject has been considered, but will limit our references to cases where this particular language of the bankruptcy act and its construction were involved. McDonald v. Brown, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659; Sanderson v. Hunt, 116 Ky. 435, 76 S. W. 179; McChristal v. Clisbee, 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702.

We are not aware of any decision of the Federal Courts upon this precise question, but there are several which seem to point to the conclusion that the injuries contemplated in § 17 of the bankrupt act are not restricted to those which are inflicted upon the physical person of the party, but extend to those inherent rights of the person, which stand in the same class as his right to security from violence done to his body. Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. ed. 754; In re Freche (D. C.) 109 Fed. 620; In re Maples (D. C.) 105 Fed. 919. And see Leicester v. Hoadley, 66 Kan. 172, 71 Pac. 318, 65 L. R. A. 523.

The order of the Circuit Court must be affirmed, with costs.[9]

PETERS v. UNITED STATES ex rel. KELLEY

177 Fed. 885, 101 C. C. A. 99

(Circuit Court of Appeals, Seventh Circuit. January 28, 1910)

After relatrix was adjudged a bankrupt by the court below, and before she was discharged, appellant as sheriff took her into custody under an execution against her body. The execution was issued by virtue of a judgment entered against her in favor of Michael Burke by the Circuit Court of Champaign county, Ill., before her voluntary petition in bankruptcy was filed. On her petition for a writ of *habeas corpus* in the District Court, she was temporarily released from custody, pending her application for a discharge in bankruptcy. After her discharge in bankruptcy was granted, the District Court considered her petition for the writ, the sheriff's return, and certain testimony, and

9—See Friend v. Talcott, 228 U. S. 27.

thereupon entered the order appealed from, finally discharging relatrix from the custody of the sheriff.

§ 17 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1310]), provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities * * * for willful and malicious injuries to the person or property of another."

The sheriff's return exhibited the record of the proceedings and judgment of the Champaign county Circuit Court. On the hearing, relatrix admitted that the proceedings and judgment were correctly stated in the return.

Burke's declaration was in three counts. The first was the common-law count for trespass *vi et armis*. The second stated that Burke was 11 years old, and was attending a public school in Champaign county, of which relatrix was the teacher; that relatrix, under pretense of inflicting punishment upon him for some alleged infraction of the rules, kept him after school, and then and there, without any just or sufficient excuse, unlawfully, willfully, wantonly, and maliciously struck and beat him violently with a certain stick or club; that the punishment administered as aforesaid was grossly and maliciously excessive; whereby he was permanently injured, etc. The third also detailed a "wanton and malicious" assault with a stick and club.

Relatrix pleaded the general issue; also that the alleged assault was only a moderate and proper punishment of Burke as pupil by relatrix as teacher; and, further, that the alleged assault occurred while relatrix was making a proper defense against an assault by Burke.

On issues so tendered, and closed by Burke's general replication, the jury returned a general verdict of guilty and assessed Burke's damages at $1,800. Judgment in due form was entered. Relatrix prayed an appeal to the Appellate Court of Illinois, but the appeal was never perfected; and no bill of exceptions, preserving the evidence and the instructions of the court to the jury, was ever filed.

At the *habeas corpus* hearing the District Court permitted relatrix, over appellant's objection, to go into her side of the merits of the alleged assault. Appellant introduced no evidence touching the original occurrence on which the declaration was based.

BAKER, Circuit Judge (after stating the facts as above). If the District Court and this court were at liberty to inquire *de novo* into the question whether relatrix inflicted a willful and malicious injury upon the person of her 11 year old pupil, a fair answer could not be given from this record. Relatrix and her witnesses gave their present version of her side of the story (some of them admitting on cross-examination that they were adding matters not testified to by them in the State Court); but the boy and his witnesses did not attend the hearing in the District Court. We could not properly pass upon the truth of the original charge *de novo,* without considering the testimony in support of the charge.

Relatrix's direct adversary in the District Court was not the boy, but the sheriff; and he evidently thought he was doing his full duty as a disinterested officer of the law when in response to the demand that he show cause why he detained relatrix in custody he produced the writ he held and the record of the proceedings and judgment on which the writ was issued. And so he was; for a writ of *habeas corpus* cannot lawfully be used as a means of bringing the original parties into court to relitigate their original controversy—it cannot even be used lawfully to review and revise alleged errors of law or fact in the original litigation. "No court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void. Where a court had jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of *habeas corpus,* which may not in this manner usurp the functions of a writ of error." Kaizo v. Henry, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. ed. 125, and cases there cited. Also Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650, and In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. ed. 1110.

The character of the "liability," as that word is used in amended § 17 (2) of the bankruptcy act, is not changed by the fact that the liability was reduced to judgment. Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. ed. 754; Boynton v. Ball, 121 U. S. 457, 466, 7 Sup. Ct. 981, 30 L. ed. 985; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292, 8 Sup. Ct. 1370, 32 L. ed. 239. The question, therefore, is whether the judgment of the State Court is conclusive evidence of a liability of relatrix for

a willful and malicious injury to the person of the judgment plaintiff.

"Willful and malicious injury," in the bankruptcy act and everywhere in the law, does not necessarily involve hatred or ill will as a state of mind, but arises from "a wrongful act, done intentionally, without just cause or excuse." "In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained." Tinker v. Colwell, 193 U. S. 473, 485, 24 Sup. Ct. 505, 508, 48 L. ed. 754.

In the second and third counts of the declaration the charge was explicitly made that relatrix inflicted the injury willfully and maliciously; that she intentionally overstepped her authority as teacher, and administered an excessive punishment without just cause or excuse. By her pleas of denial, of authority as teacher, and of self-defense, she accepted the gage; and the jury found her guilty. What the evidence was, what the instructions were, we do not know; nor, if the second and third were the only counts, could we inquire, for unquestionably a judgment thereon would be conclusive that in fact and in law the relatrix had inflicted a willful and malicious injury upon the person of the judgment plaintiff.

Relatrix contends that under the first count, for trespass *vi et armis,* a recovery could be had without proof of a willful and malicious injury, and thereupon insists that it was not erroneous for the District Court to inquire *de novo* into the real nature of the alleged assault. If the assumption as to the character of the first count were warranted, the predicated result would not follow. The most that would be authorized (if anything) would be to show that at the trial in the State Court no evidence was introduced in support of the second and third counts, and that the evidence which was introduced under the first count did not tend to prove a willful and malicious injury. This, not on the theory of disputing the record or questioning the adjudication, but on the theory that the record was ambiguous, and that therefore evidence *dehors* the record was proper and necessary to disclose what in truth had been adjudicated. The assumption, however, is unwarranted, for by the law of Illinois (as generally elsewhere) a judgment for damages under a count of trespass *vi et armis* cannot lawfully be rendered except upon proof of a willful and malicious injury. Jernberg v. Mix, 199

Ill. 254, 65 N. E. 242; Gilmore v. Fuller, 198 Ill. 143, 65 N. E. 84, 60 L. R. A. 286; Forsyth v. Vehmeyer, 176 Ill. 365, 52 N. E. 55; In re Mullen, 118 Ill. 551, 9 N. E. 208; In re Murphy, 109 Ill. 31; Paxton v. Boyer, 67 Ill. 133, 16 Am. Rep. 615; Razor v. Kinsey, 55 Ill. App. 605; Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. ed. 754; McChristal v. Clisbee, 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702. And the full faith and credit to which the judgment of the State Court is entitled would not be rendered if a doubt were entertained that the jury under proper instructions based their verdict on sufficient evidence.

The order appealed from is reversed, and the cause is remanded to the District Court with the direction to dismiss the petition.[10]

GROSSCUP, Circuit Judge (dissenting). The policy of the Bankruptcy Law is to discharge all honest debtors who have fallen into insolvency, that they may have another opportunity in the race of life. The debtors excepted from this general policy are those who have become such through "fraud," or through the obtaining of property "by false pretenses or false representations," or through the committing of "willful and malicious injuries to the person or property of another." Under the old bankruptcy law, the exception founded on fraud could only be made out by the disclosure of "a fraud involving moral turpitude or intentional wrong," and did not extend to a mere fraud implied by law. Hennequin v. Clews, 111 U. S. 676, 681, 4 Sup. Ct. 576, 28 L. ed. 565; Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. ed. 723 (quotation from Tinker v. Colwell, 193 U. S. 488, 24 Sup. Ct. 509, 48 L. ed. 754). The Supreme Court does not hold that "fraud," as the word is employed in the present bankruptcy act, is met by anything less than the foregoing, for it says (Tinker v. Colwell, 193 U. S. 489, 24 Sup. Ct. 509, 48 L. ed. 754):

"Assuming that the same holding would be made in regard to the fraud mentioned in the present act, it is clear that the cases are unlike. The implied fraud which the Court in the above-cited cases released was of such a nature that it did not impute

10—The concurring opinion of SEAMAN, Circuit Judge, is omitted. McChristal v. Clisbee, 190 Mass. 120, 3 L. R. A. (N. S.) 702, 5 Ann. Cas. 769; Kavanaugh v. McIntyre, 210 N. Y. 175 (wrongful conversion of stocks), *acc. Cf.* Tompkins v. Williams, 137 App. Div. 521, 122 N. Y. Supp. 152.

either bad faith or immorality to the debtor, while in a judgment founded upon a cause of action, such as the one before us [crim. con.] the malice which is implied is of that very kind which does involve moral turpitude."

And, of course, a debtor who has become such through the obtaining of property by false pretenses or false representations (the second element of the list of exceptions), necessarily has become such debtor by bad faith, or conscious wrong. Up to this point then, so far as the Supreme Court has construed the present bankruptcy act, the exceptions are founded upon the element of bad faith or conscious wrong involved in the debts from which release is asked.

Is the third exception, "willful and malicious injuries to the person or property of another," to receive a like interpretation? I am deeply impressed with the belief that such will be the interpretation put upon it by the Supreme Court when the question is squarely presented to that Court. This impression is founded, first, upon the care that the court has taken in Tinker v. Colwell to exclude any contrary impression; for in every sentence of the court's opinion, stress is laid upon the element of actual bad faith and moral turpitude involved in the particular debt before the court.

"The judgment here mentioned comes, as we think," says the court, "within the language of the statute reasonably construed. The injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself, and we think Congress did not intend to permit *such an injury* to be released by a discharge in bankruptcy." (The italics are my own.)

I am also impressed that it is the interpretation that, to carry out the intention of Congress, ought to be put upon the phrase as used in the bankruptcy act. The exception is in the nature of a denial—the denial of something that all others obtain. And it seems to me that Congress meant that this denial should be interposed, not upon any mere fiction of the law, or any mere empty implication of the law, but only upon the disclosure of something, in the transaction out of which the debt arose, that gives to it the color of bad faith or conscious wrong doing.

The case before us is that of a school teacher, who, in the lawful exercise of her power to inflict punishment, has inflicted excessive punishment. I say this is the case before us, because unless such be a "willful and malicious injury" within the meaning of the bankruptcy act, the judgment in the trespass suit is not conclusive upon the bankruptcy court; for, by the law of Illinois and most common law jurisdictions, under the issue raised by the first count (trespass *vi et armis* for simple assault and battery), the pleas of *moderate castigavit* and *son assault demesne,* and the replication *de injuria,* a recovery could be had for an excess of force employed by the relatrix beyond reasonable chastisement, assuming, of course, that the evidence submitted warranted such recovery. Ayres v. Kelley, 11 Ill. 17; Fortune v. Jones, 30 Ill. App. 116; Hannen v. Edes, 15 Mass. 347; Bennett v. Appleton, 25 Wend. 371; Devine v. Rand, 38 Vt. 621. And, for the purpose of this appeal, the scope of that judgment, where doubt or ambiguity exists, must be construed most strongly against him who invokes it as *res judicata;* from which it follows, that the verdict returned, being a general verdict (and being as applicable to the first count as to the second or third counts) is as applicable to a case of mere excess of force, initially lawful, employed beyond reasonable chastisement, though without any conscious or designed wrong-doing, as it would be to a case of assault originating in conscious wrong-doing.

No one pretends that a school teacher chastising a pupil, or a master of a vessel punishing some member of his crew, or an individual resisting an assault, may not, without actual malice, go beyond the force actually needed and therefore make themselves liable to a civil action for trespass *vi et armis.* In each of these cases, the malice imputed may be the mere "fiction of malice"—a fiction created to give the complaining party a standing for a civil suit in the form of action selected. There is in such conduct, unless of course actual malice is shown, no bad faith or conscious wrong—nothing indeed that distinguishes the moral quality of the act from the moral quality of the owner of a factory who allows his employees to come into contact with defective machinery, or the owner of a carriage who takes in a passenger with knowledge that he has a defective vehicle, or, as put by Justice Peckham in Tinker v. Colwell, *supra,* "one who negligently drives through a crowded thoroughfare and negligently runs over an individual, would not, as I suppose, be within the exception."

True, in In re Murphy, 109 Ill. 31, it was said that malice was the gist of an action of trespass for assault and battery; but it was not ruled that mere malice, as a fiction of law, was the same thing as conscious wrong-doing. The facts in In re Murphy are not given. The case relied on as a precedent was First National Bank of Flora v. Burkett, 101 Ill. 392, 40 Am. Rep. 209, in which it was said:

"It (malice) in some cases implies a wrong inflicted on another, with an evil intent or purpose, and this is the sense in which it is employed in the statute."

And for anything appearing in In re Murphy, it was that kind of malice that was there shown. Indeed, the court says, speaking of the facts before it (as already said, the facts are not reported):

"Here there was an intent to do harm, and an unlawful execution of that intent, resulting in the infliction of a wrong and injury upon another. Under such circumstances was malice the gist of the action?"

And that this, in its application to the state insolvent law, is as far as the Supreme Court of Illinois meant to go (considering the case as one of actual malice and not mere malice by fiction of law) is shown by that court in the subsequent case of Jernberg v. Mix, 199 Ill. 254, 256, 65 N. E. 242, where it is said:

"The term 'malice,' as used in the act in question (the insolvent act) applies to that class of wrongs which are inflicted with an evil intent, design or purpose. It implies that the guilty party was actuated by improper or dishonest motives, and requires the intentional perpetration of an injury or a wrong on another."

Let me not be misunderstood. As I understand the Supreme Court of the United States in Tinker v. Colwell, and the Supreme Court of Illinois in the cases just spoken of, a distinction is observed, where the bankruptcy and insolvent laws are involved, between malice as a fiction of law and malice arising from bad faith or conscious wrong-doing. Indeed, in the supposititious case stated by Justice Peckham, the form of action might have been trespass *vi et armis* or trespass on the case, that is to say might have been an action implying malice by fiction of law, or an action not implying malice at all, depending, on the election of the plaintiff, whether he counted upon the negligence or upon the forcible invasion of his right to security as the basis of recovery. Percival v. Hickey, 18 Johns. (N. Y.) 257, 9 Am.

Dec. 210. That Congress intended that discharge from debts, under this exception to the general policy of the bankruptcy law, should be granted or denied, not according to the real inherent quality of the transaction out of which the debt arose, but wholly in accordance with the accident whether recovery is sought in one form of action or another, I cannot believe; for whether, as a mere fiction of law, there be malice or not, the moral character of the wrong complained of is the same, the evidence alone determining the animus of the act. And in the case before us, the evidence alone can determine whether or not the excessive punishment was due to an honest mistake of judgment or want of due care, or whether it was due to motives of ill-will, hatred and malevolence.

I am giving expression to this dissent because, in my judgment the majority opinion misinterprets Tinker v. Colwell (and in that decision there were four dissenting justices); and because this misinterpretation, unless this clause of the bankruptcy act is construed by the Supreme Court, is liable to be followed by what seems to me an unjust, if not unauthorized, application of the law.

One other phase of this question has thus far wholly gone unnoticed. The phrase, in the bankruptcy act, is "willful and malicious injuries." If this means that willfulness and malice, even though the malice be merely a fictitious malice, must concur, then the case of a school teacher, master of a vessel, or party assaulted, who uses more force than what is needed, but does it without consciousness of such excess, cannot be said to be willful, for "willful" means conscious intention. And to put such an interpretation upon the phrase—joining the two words as characterizing the act—brings this third exception into line with the first and second exceptions, to-wit, "fraud" and the obtaining of property by "false pretenses or false representations."

I am not sure that the order appealed from in this case should be affirmed. That might preclude the holder of the judgment from showing, in some appropriate way, that the injury was actually malicious. But the judgment from which this is a dissent, on the other hand, accepts the judgment in the trespass suit as *res judicata*, and thereby forestalls any appropriate inquiry as to whether the injury was without actual malice, bad faith, or conscious wrong-doing.

DUNBAR v. DUNBAR

190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. 757

[See this case given on page 424, *ante*.]

In re WARTH

200 Fed. 408, 118 C. C. A. 560

(Circuit Court of Appeals, Second Circuit. November 11, 1912)

NOYES, Circuit Judge. The District Court properly restrained the petitioner from enforcing her judgment in case, but only in case, it was dischargeable. And whether it were dischargeable depends upon the real nature of the action in which the judgment was obtained. Its form was immaterial.

The action was in form for breach of promise to marry. The seduction was in form but an aggravation of the damage. The strict rule of the common law that a woman who consents cannot complain directly of the greatest possible wrong, had to be adhered to. But the action while in form upon contract was in substance for the gross fraud which the man perpetrated in taking advantage of the confidential relation established by the marriage engagement to accomplish the woman's dishonor. The substantial damages which the petitioner obtained were not for the deprivation of the matrimonial alliance, but for the loss of character and the ever-continuing shame and sorrow.

It has been the policy of the Bankruptcy Act to discharge honest debtors but not to afford a shield to willful wrongdoers and to avoid the possibility that seducers might take advantage of it, Congress in 1903 passed an amendment providing that liability for "the seduction of an unmarried female" should not be discharged. The provision is broad and we have no doubt applies and was intended to apply to every case where there is liability for seduction whether the action to enforce such liability be based, as is permitted in some states, directly upon the essential wrong, or by reason of the limitations of the common law, be founded upon the incident—the refusal to marry. To say that Congress intended to distinguish between these cases is to say that it intended to further favor seducers in those jurisdictions where they are already favored by adherence to an artificial form of action which often operates to prevent the enforcement of a morally just demand.

The contention is made that as the action is in form for breach of contract some portion of the damages awarded must have been for the loss of the matrimonial alliance and that as the judgment cannot be split up all must be discharged. As already pointed out, however, the real wrong for which the plaintiff recovered was for the seduction, and in the absence of any showing to the contrary it will be presumed that the substantial damages were awarded for that.

The order of the District Court is reversed with costs.[11]

GEE v. GEE

84 Minn. 384, 87 N. W. 1116

(Supreme Court of Minnesota. Nov. 22, 1901)

LOVELY, J. Plaintiff and defendant formed a partnership on the 30th of July, 1896, for the purpose of buying and selling grain on commission. Plaintiff was to give no attention to the business. Defendant was personally to conduct the same, and receive $60 per month therefor. Such connection continued until January 7th following, when it was dissolved by mutual consent. Thereafter an action was brought by plaintiff against his partner for an accounting, which was submitted to a referee. The referee heard the evidence, and made findings on which judgment was ordered against the defendant for a substantial sum, which was duly entered and docketed. In September of the following year defendant made application for the benefits of the federal bankrupt act, in which he properly scheduled his liabilities, including plaintiff's judgment, and, upon proceedings duly had, was legally discharged. The judgment against defendant still remaining of record, under the provisions of c. 262, Gen. Laws 1899, he moved the District Court in which it was docketed to discharge the same. At the hearing of this motion it was claimed by plaintiff that the judgment was excepted from the discharge in bankruptcy, and he was given leave to bring suit thereon, which he did. Defendant answered, setting up his discharge in bankruptcy. Plaintiff, by reply, alleged that the judgment referred to was for defendant's fraud and misappropriation while acting in a fiduciary capacity, which facts, under his claim, excepted the judgment from the effect of the

11—Followed in In re Grounds, 215 Fed. 280.

bankruptcy discharge. The action was tried to the District Court for St. Louis county, which, after having made findings of fact and law in favor of defendant, ordered judgment thereon. Plaintiff moved for a new trial upon a settled case, which was denied. From this order, plaintiff appeals.

Under plaintiff's contention, the disposition of this appeal is within a very narrow compass, depending upon the construction of that portion of the federal bankrupt act of 1898 which excepts from the discharge "judgments in actions for frauds, * * * or debts created by fraud, * * * in any fiduciary capacity." 30 Stat. 550, § 17, cls. 2, 4. Plaintiff insists, first, that the action for accounting was based upon the fraudulent acts of the defendant in the misappropriation of partnership funds and property. His theory is that the partnership was controlled by an agreement under which defendant was authorized to withdraw $60 per month for his services, and no more; also that it was defendant's duty to render an account from month to month, which he did not do. Other than the connection between the partnership agreement and general allegations of deficit and misappropriation of funds by defendant, there was nothing in the complaint in the suit before the referee which would justify the claim that fraud was litigated therein. It was an ordinary equitable action for an accounting between partners, sounding in contract (3 Pom. Eq. Jur. p. 1431), and asking for a money judgment. Neither do we think the findings of the referee justify the claim that defendant was guilty of defrauding plaintiff in the conduct of the partnership business. It was found by the referee that during the period of the partnership defendant "converted" a certain sum of money, which counsel claims *ex vi termini* indicates fraud; but it is clear from the remaining findings that the word "converted" was used in no such sense, but to describe conduct not inconsistent with honesty and good faith. From which it follows that neither the findings nor the judgment entered thereon in the suit before the referee established any fraud by defendant in the management of the partnership business. As distinguished from the previous United States bankruptcy acts, the act of 1898 provides for two separate classes of exceptions from the discharge of the bankrupt, viz., one in which the judgment must be for fraud, and the other in which the debt must have arisen upon embezzlement, misappropriation, or fraud in a "fiduciary capacity." It is probable, as held in Re Rhutassel (D. C.) 96 Fed. 597, that it was the

purpose of the present bankruptcy act to provide that in the first class of cases the fraud should be shown or evidenced by a judgment, or at least disclosed in the judgment roll, while in the case of debts for "fraud in a fiduciary capacity" proof of the fiduciary capacity would furnish the test of the exception which would apply to cases of violation of express trusts. But it is not necessary in this case to anticipate a decision of the Supreme Court of the United States in that respect, for the trial judge, not having before it a judgment for fraud, fully considered the weight of evidence on that question, and found that there was no fraud, upon testimony that amply supports his conclusions in that respect, and forecloses any further inquiry upon that issue here, leaving for us the simple duty of construing the meaning of the provision that excepts "fraud in a fiduciary capacity" from the operation of the bankruptcy discharge. So that it only remains to be considered whether, under the partnership agreement, a violation of the obligations imposed upon the defendant by its provisions for payment and account for moneys received, as well as the defendant's withdrawal of more money than his salary, was a breach of a fiduciary relation, within the purview of the bankruptcy exception referred to. In the national acts of bankruptcy for 1841 and 1867 the discharge of the bankrupt excepts him from a debt of a similar nature. In both of these acts the word "fiduciary" was employed as a designation of the relation from which a discharge would not operate, and such term has received authoritative interpretation from the highest tribunal in the land, which concededly has final jurisdiction in such matters. The term "fiduciary" in the provisions of these acts has been held by the United States Supreme Court, as well as other courts, to apply to what may be understood as technical or express, rather than implied, trusts, and as excluding from such interpretation frauds by commission men, brokers, agents, etc. Neal v. Clark, 95 U. S. 704, 24 L. ed. 586; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. ed. 565; Palmer v. Hussey, 87 N. Y. 303; Id., 119 U. S. 96, 7 Sup. Ct. 158, 30 L. ed. 362; Noble v. Hammond, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. ed. 621. The implied trust relation existing between partners, under which their liabilities to each other must be determined, does not bring their affairs within the definition of the excepted term, "fiduciary," in the bankruptcy act, under the construction given in the above decisions. In a leading case in a court of high authority, which had

previously decided that implied as well as express trusts were embraced in the exception of the bankruptcy act referred to, it was held that even under such interpretation the exception of the act would not extend to an implied trust between the members of a partnership (Hill v. Shiebley, 68 Ga. 556); and we are clearly of that opinion. While the collocation of language in which the term "fiduciary" is used in the former acts is not precisely the same as in the act of 1898, there is no reason to apprehend that a different construction will be given to that word than by the previous decisions in the court of final jurisdiction in such matters. In re Basch (D. C.) 97 Fed. 761; Bracken v. Milner (C. C.) 104 Fed. 522.

The order appealed from is affirmed.

ZAVELO v. REEVES

227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. 365

[See this case given on page 391, *ante*.]

ALLEN & CO. v. FERGUSON

18 Wallace, 1, 21 L. ed. 854

(United States Supreme Court. October Term, 1873)

P. H. Allen & Co. sued A. H. Ferguson upon a promissory note, dated March 20th, 1867, payable one day after date, with interest.

Ferguson appeared and pleaded his discharge in bankruptcy in bar to the action.

The plaintiffs replied a new promise in writing made while the proceedings in bankruptcy were pending. This promise the plaintiffs averred that they relied upon, and in consequence of it made no efforts to collect their debt. The alleged promise was contained in the following letter, which the plaintiffs made part of their replication, viz.:

"Crockett's Bluff, Arkansas, January 7th, 1868.

"Messrs. T. H. Allen & Co.

"Dear Sir: I avail myself of this opportunity to give you a fare statement of my pecuniary affa'res. First, I failed to make a crop; secondly, find myself involved as security to the amount of five or eight thousand dollars; was sued, and judgments was

render'd against me at the last turm of our co'rt for about $4000, a sum suf'ic'ent to sell all the avai'ble property that I am in possession of. I lost about $3000 by persons taking the bankrupt law. This is my situation. I was, as you can re'dily conclude, in a bad fix. To remain as I was, at that time, my property would be sold to pay security debts, and my just creditors would not get any part of it, and that I would be redused to insolvency and still ju'gments against me. As a last resort concluded to render a skedule myself in order to forse a prorater division of my affects. The five bales cotton I shipt you was all my crop, to pay you for the meat that you had sent me, to enable me to make the little crop that I did make. The cash that I requested you to send me was, for myself and William Ferguson, to pay his hands for labor; and one hundred and fifty yards of the bag'ing was for W. Ferguson, and one barel of the salt. I have been absent from home for the last two weeks; got home last night, and has not sean him yet, but suppose he has shipt you some cotton. If he has not done so, I will see that he sends you cotton at once. *Be satisf'ed; all will be right. I intend to pay all my just debts, if money can be made out of hired labor. Security debt I cannot pay.* I shall have a hard time, I suppose, this se'son, but will do the best I can.

"Jan. 8.—Since the above was writ'en I have seen William Ferguson. He says he ship'ed you two bales cotton, ten or twelve days ago, and ship'ed in my name, as the baggin' was order'd by me for him. William Ferguson will be in Memphis betwixt this and the first of March, and will call and see you on bisness matters betwixt me and you'self. *All will be right betwixt me and my just creditors.* Don't think hard of me. Attribet my poverty to the unprincipel'd Yankey. Let me heare from you as usel.

"Yours, very respectfully,

"A. H. Ferguson."

To this replication the defendant demurred. The demurrer was sustained by the Circuit Court, and this appeal was taken by the plaintiffs.

Mr. Justice HUNT delivered the opinion of the court.

The question is, does the letter of the defendant, set forth in the replication, contain a sufficient promise to pay the debt in suit?

All the authorities agree in this, that the promise by which a discharged debt is revived must be clear, distinct, and unequivocal. It may be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred if the promise be conditional. The rule is different in regard to the defense of the statute of limitations against a debt barred by the lapse of time. In that case, acts or declarations recognizing the present existence of the debt have often been held to take a case out of the statute. Not so in the class of cases we are considering. Nothing is sufficient to revive a discharged debt unless the jury are authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt. Thus, partial payments do not operate as a new promise to pay the residue of the debt. The payment of interest will not revive the liability to pay the principal, nor is the expression of an intention to pay the debt sufficient. The question must be left to the jury with instructions that a promise must be found by them before the debtor is bound. (Hilliard on Bankruptcy, 264 to 266, where the cases are collected.)

The plaintiffs in error contend that such promise is to be found in the letter of the defendant, forming a part of their replication. They rely chiefly on these expressions: "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made from hired labor. Security debt I cannot pay," and on the postscript where he adds, "All will be right betwixt me and my just creditors."

There can be no more uncertain rule of action than that which is furnished by an intention to do right. How or by whom is the right to be ascertained? What is right in a particular case? Archbishop Whately says: "That which is conformable to the supreme will is absolutely right, and is called right simply, without reference to a special end. The opposite to right is wrong." This announces a standard of right, but it gives no practical aid. What may be right between the defendant and his creditors is as difficult to determine as if he had no such standard. It is not absolutely certain that it is right for a creditor, seizing hs debtor, to say, Pay me what thou owest, or that it is wrong for the debtor to resist such an attack. It is not unnatural that the creditor should think that payment of the debt was right, and that it was the only right in the case. It is equally natural that the debtor should entertain a different opin-

ion. The law holds it to be right that a debtor shall devote his entire property to the payment of his debts, and when he has done this that after-acquired property shall be his own, to be held free from the obligation of all his debts, just debts as well as unjust, principal debts as well as security debts. Neither the supreme will, so far as we can ascertain it, nor the laws of the land, require that a debtor whose family is in need, or who is himself exhausted by a protracted struggle with poverty and misfortune, should prefer a creditor to his family; that he should appropriate his earnings to the payment of a debt from which the judgment of the law has released him, rather than to the support of his family or to his own comfort. What an honest man should or would do under such circumstances it is not always easy to say. When, therefore, the debtor in this case said to the plaintiff: "Be satisfied; I intend to do right; all will be right betwixt my just creditors and myself," he cannot be understood as saying that he would certainly pay his debt, much less that he would pay it immediately, as the plaintiff assumes. What is or what may be right depends upon many circumstances. The principle is impracticable as a rule of action to be administered by the courts. There is no standard known to us by which we are able to say that it is wrong in the defendant not to pay the plaintiff's debt.

We are of the opinion that the letter produced does not contain evidence of a promise to pay the debt in suit, and that the judgment appealed from must be affirmed.[12]

12—See Matthewson v. Needham, 81 Kans. 340, 26 L. R. A. (N. S.) 274.

APPENDIX

STATUTES

STATUTE OF 13 ELIZABETH

Ch. 5

§ 1. For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

§ 2. Be it therefore declared, ordained, and enacted by the authority of this present Parliament, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded), to be clearly and utterly void, frustrate, and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary, notwithstanding.

§ 3. And be it further enacted by the authority aforesaid, that all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same, or any of them, which at any time after the tenth day of June next coming shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had, or made, *bona fide* and upon good consideration; or shall alien or assign any of the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof; shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or

shall be contained in any such covinous and feigned bond, the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid, to be recovered in any of the Queen's courts of record, by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law shall be admitted for the defendant or defendants; and also being thereof lawfully convicted, shall suffer imprisonment for one-half year without bail or mainprise.

* * * * * * * * * * * * *

§ 6. Provided also, and be it enacted by the authority aforesaid, that this act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid; anything before mentioned to the contrary hereof, notwithstanding.

* * * * * * * * * * * * *

NEW YORK STATUTE OF 1829 [1]

(New York Rev. Stat. 1829, Part II, Ch. VII, Title III)

§ 1. Every conveyance of assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void.

* * * * * * * * * * * * *

§ 3. Every conveyance, charge, instrument, or proceeding declared to be void, by the provisions of this chapter, as against creditors or purchasers, shall be equally void against the heirs, successors, personal representatives, or assignees of such creditors or purchasers.

§ 4. The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.

§ 5. The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

[1] These provisions, in somewhat altered phraseology, are to be found in the present Consolidated Laws, c. 50 (Real Property Law), §§ 263-266; c. 45 (Personal Property Law), §§ 35, 37. They have furnished the pattern for the legislation of many states. *Bigelow, Fraudulent Conveyances (Knowlton's ed.), pp. 24, 25.*

UNITED STATES BANKRUPTCY LAW

(ACT OF JULY 1, 1898, CH. 541; 30 Stat. at L. 544; 1 Fed. Stat. Annot. 525)

AS AMENDED BY

THE ACT OF FEBRUARY 5, 1903, CH. 487 (32 Stat. at L. 197; 10 Fed. Stat. Annot. 38); THE ACT OF JUNE 15, 1906, CH. 3333 (34 Stat. at L. 267; 1909 Supp. Fed. Stat. Annot. 55); AND THE ACT OF JUNE 25, 1910, CH. 412 (36 Stat. at L. 838; 1912 Supp Fed. Stat. Annot. 21)

AN ACT

To Establish a Uniform System of Bankruptcy Throughout the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CHAPTER I

DEFINITIONS

§ 1. Meaning of Words and Phrases.—a The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; (13) "document" shall include any book, deed, or

1—Those portions of the Act which remain as originally enacted in 1898 are printed in Roman type; changes made by the amendments of 1903, 1906 and 1910 are indicated by the use of *italics;* the original form of the amended sections is given in the footnotes.

instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

CHAPTER II

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION

§ 2. That the courts of bankruptcy as hereinbefore defined, viz, the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their

respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; *and allow such officers additional compensation for such services,* as provided in section forty-eight of this Act;* * [2] (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be

2—§ 2 (5) originally read as follows: "(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates."

The amendment of 1903 added the words: "and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services."

The amendment of 1910 struck out the last clause added by the amendment of 1903 and substituted the words between the asterisks.

necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; *and (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.*[3]

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III

BANKRUPTS

§ 3. ACTS OF BANKRUPTCY.—a Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States;*[4] or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time

3—§ 2 (20) was added by the amendment of 1910.

4—The italicised words were added by the amendment of 1903.

of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

§ 4. WHO MAY BECOME BANKRUPTS.—a Any person, except a *municipal, railroad, insurance, or banking* corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any *moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking* corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.[5]

5—§ 4 originally read as follows: "a Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt. b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

§ 5. PARTNERS.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

§ 6. EXEMPTIONS OF BANKRUPTS.—a This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

§ 7. DUTIES OF BANKRUPTS.—a The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee

The amendment of 1903 added the word "mining" after "publishing" in the list of classes of corporations subject to involuntary bankruptcy under § 4b, and added the following provision: "The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States."

The other changes were made by the amendment of 1910.

of any attempt, by his creditors, or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

§ 8. DEATH OR INSANITY OF BANKRUPTS.—a The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided,* That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

§ 9. PROTECTION AND DETENTION OF BANKRUPTS.—a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or

give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

§ 10. EXTRADITION OF BANKRUPTS.—a Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

§ 11. SUITS BY AND AGAINST BANKRUPTS.—a A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

§ 12. COMPOSITIONS, WHEN CONFIRMED.—a A bankrupt may offer, *either before or after adjudication*, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and *has* filed in court the schedule of his property, and *the* list of his creditors required to be filed by bankrupts. *In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.*[6]

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the

6—The words in italics were added by the amendment of 1910.

best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

§ 13. COMPOSITIONS, WHEN SET ASIDE.—a The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

§ 14. DISCHARGE, WHEN GRANTED.—a Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by *the trustee or other* parties in interest, at such time as will give *the trustee or* parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which *such* condition might be ascertained; *or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.*[7]

7—§ 14b originally read as follows: "b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

The amendment of 1903 changed it

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

§ 15. DISCHARGE, WHEN REVOKED.—a The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

§ 16. CO-DEBTORS OF BANKRUPTS.—a The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

§ 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, *or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;* (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.[8]

to read as follows: "The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

The other changes were made by the amendment of 1910.

8—§ 17 originally read as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The changes were made by the amendment of 1903.

CHAPTER IV

COURTS AND PROCEDURE THEREIN

§ 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits *to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.*[9]

b The bankrupt, or any creditor, may appear and plead to the petition within *five* days after the return day, or within such further time as the court may allow.[10]

c All pleadings setting up matters of fact shall be verified under oath.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

§ 19. JURY TRIALS.—a A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the ques-

9—§ 18a originally read as follows: "Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States."

The change was made by the amendment of 1903.

10—Before the amendment of 1903, the time to plead was ten days after the return day, instead of five.

tion of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

§ 20. OATHS, AFFIRMATIONS.—a Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

§ 21. EVIDENCE.—a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt *and his wife*, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.

Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.[11]

b The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force

11—§ 21a originally read as follows: "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act."

The change was made by the amendment of 1903.

and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

§ 22. REFERENCE OF CASES AFTER ADJUDICATION.—a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

§ 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e.*[12]

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

§ 24. JURISDICTION OF APPELLATE COURTS.—a The Supreme Court of the United States, the circuit courts of appeals of the United States, and

12—§ 23b originally read as follows: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

The amendment of 1903 added the words, "except suits for the recovery of property under section sixty, sub division b, and section sixty-seven, subdivision e."

The amendment of 1910 added also the words "and section seventy, subdivision e."

the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from the courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b The several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

§ 25. APPEALS AND WRITS OF ERROR.—a That appeals, as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

§ 26. ARBITRATION OF CONTROVERSIES.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to

the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

§ 27. COMPROMISES.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

§ 28. DESIGNATION OF NEWSPAPERS.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

§ 29. OFFENSES.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

§ 30. RULES, FORMS, AND ORDERS.—a All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

§ 31. COMPUTATION OF TIME.—a Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

§ 32. TRANSFER OF CASES.—a In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts, relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V

OFFICERS, THEIR DUTIES AND COMPENSATION

§ 33. CREATION OF TWO OFFICES.—a The offices of referee and trustee are hereby created.

§ 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—a Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

§ 35. QUALIFICATIONS OF REFEREES.—a Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

§ 36. OATHS OF OFFICE OF REFEREES.—a Referees shall take the same oath of office as that prescribed for judges of United States courts.

§ 37. NUMBER OF REFEREES.—a Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

§ 38. JURISDICTION OF REFEREES.—a Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the

application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

§ 39. DUTIES OF REFEREES.—a Referees shall (1) declare dividends and prepare and deliver to trustee dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notice to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

§ 40. COMPENSATION OF REFEREES.—a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of *fifteen* dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, *and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration,* and from estates which have been administered before them one per centum commission on *all moneys disbursed to creditors by the trustee,* or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.[18]

18—§ 40a originally read as follows: "Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

The change was made by the amendment of 1903.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is especially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

§ 41. CONTEMPTS BEFORE REFEREES.—a A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

§ 42. RECORDS OF REFEREES.—a The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

§ 43. REFEREE'S ABSENCE OR DISABILITY.—a Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

§ 44. APPOINTMENT OF TRUSTEES.—a The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

§ 45. QUALIFICATIONS OF TRUSTEES.—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are ap-

pointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

§ 46. DEATH OR REMOVAL OF TRUSTEES.—a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

§ 47. DUTIES OF TRUSTEES.—a Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied;*[14] (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the costs and disbursements of the proceedings.[15]

14—The italicized words in § 47a (2) were added by the amendment of 1910.

15—§ 47c was added by the amendment of 1903.

§ 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS.—a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, *and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them,* as may be allowed by the courts, not to exceed *six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars,* and one per centum on *moneys* in excess of ten thousand dollars. *And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.*[16]

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

d Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one

16—§ 48a originally read as follows: "Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars."

The amendment of 1903 changed it to read as follows: "Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition."

The other changes were made by the amendment of 1910.

per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: Provided further, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.[17]

e Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realised by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.[18]

§ 49. ACCOUNTS AND PAPERS OF TRUSTEES.—a The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

§ 50. BONDS OF REFEREES AND TRUSTEES.—a Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the

17—§ 48d was added by the amendment of 1910.

18—§ 48e was added by the amendment of 1910.

adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of these conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

§ 51. DUTIES OF CLERKS.—a Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

§ 52. COMPENSATION OF CLERKS AND MARSHALS.—a Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

§ 53. DUTIES OF ATTORNEY-GENERAL.—a The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

§ 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—a Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI

CREDITORS

§ 55. MEETINGS OF CREDITORS.—a The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

§ 56. VOTERS AT MEETINGS OF CREDITORS.—a Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

§ 57. PROOF AND ALLOWANCE OF CLAIMS.—a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g The claims of creditors who have received preferences, *voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given*, shall not be allowed unless such creditors shall surrender *such* preferences, *conveyances, transfers, assignments, or incumbrances.*[19]

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or

19—The italicised words in § 57g were added by the amendment of 1908.

by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided,* That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

§ 58. NOTICES TO CREDITORS.—a Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, *and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.*[20]

20—§ 58a originally read as follows: "Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meet-

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

§ 59. WHO MAY FILE AND DISMISS PETITIONS.—a Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, *and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.*[21]

ings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings."

The lengthening of the time of notice of applications for discharge was made by the amendment of 1910.

21—The italicised words in § 59g were added by the amendment of 1910.

§ 60. PREFERRED CREDITORS.—a A person shall be deemed to have given a preference if, being insolvent, he has, *within four months before the filing of the petition, or after the filing of the petition and before the adjudication*, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.*[22]

b If a bankrupt shall have *procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being* within four months before the filing of *the* petition *in bankruptcy* or after the filing *thereof* and before the adjudication, *the bankrupt be insolvent and the judgment or transfer then operate as a preference,* and the person receiving it or to be benefited thereby, or his agent acting therein, shall *then* have reasonable cause to believe that *the enforcement of such judgment or transfer would effect a preference,* it shall be voidable by the trustee and he may recover the property or its value from such person. *And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*[23]

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the

22—The italicised words in § 60a were added by the amendment of 1903.

23—§ 60b originally read as follows: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The amendment of 1903 changed it to read as follows: "If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The other changes were made by the amendment of 1910.

extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII

ESTATES

§ 61. DEPOSITORIES FOR MONEY.—a Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

§ 62. EXPENSES OF ADMINISTERING ESTATES.—a The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

§ 63. DEBTS WHICH MAY BE PROVED.—a Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

§ 64. DEBTS WHICH HAVE PRIORITY.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, *and*,

where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; [24] (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, *traveling or city salesmen,*[25] or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

§ 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order. *Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.*[26]

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d Whenever a person shall have been adjudged a bankrupt by a court

24—The italicized words in § 64b (2) were added by the amendment of 1903.

25—The italicized words in § 64b (4) were added by the amendment of 1906.

26—The italicized words in § 65b were added by the amendment of 1903.

without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

§ 66. UNCLAIMED DIVIDENDS.—a Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

§ 67. LIENS.—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, *to the extent of such present consideration only*, not be affected by this Act.[27]

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act

27—The italicized words in § 67d were added by the amendment of 1910.

and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*[28]

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

§ 68. SET-OFFS AND COUNTERCLAIMS.—a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

§ 69. POSSESSION OF PROPERTY.—a A judge may, upon satisfactory proof,

28—The italicised words in § 67e were added by the amendment of 1903.

by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

§ 70. TITLE TO PROPERTY.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover

the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*[29]

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

[§ 70½]. THE TIME WHEN THIS ACT SHALL GO INTO EFFECT

a This Act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b Proceedings commenced under State insolvency laws before the passage of this Act, shall not be affected by it.

§ 71. *That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.*[30]

§ 72. *That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act.*[31]

29—The italicised words in § 70e were added by the amendment of 1903.

30—§ 71 was added by the amendment of 1903.

31—§ 72 was added by the amendment of 1903 in the following form: "That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act."

The receiver and marshal were included in it by the amendment of 1910.

§ 19 of the amendatory Act of February 5, 1903, is as follows: "That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight."

§ 14 of the amendatory Act of June 25, 1910 is as follows: "That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth, nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six."

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A SUPPLEMENT

TO

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OF

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INCLUDING THE LAW OF FRAUDULENT CONVEYANCES

Selected and Arranged by

EVANS HOLBROOK and RALPH W. AIGLER

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SUPPLEMENT

TO

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CASES ON BANKRUPTCY

GRATIOT COUNTY STATE BANK v. JOHNSON

— U. S. —, 63 L. ed. —, 39 Sup. Ct. 263

(United States Supreme Court. March 17, 1919)

Mr. Justice BRANDEIS delivered the opinion of the Court.

The trustee in bankruptcy of the St. Louis Chemical Company brought suit in a state court of Michigan against the Gratiot County State Bank to recover, as illegal preferences, payments made to it within four months before the filing of the involuntary petition. The bank denied the allegation that the Chemical Company was insolvent when the payments were made. To establish that fact, the trustee offered in evidence the adjudication together with the petition on which it was based and the special master's report which it confirmed. The latter found that the debtor had been insolvent for four months or more before the filing of the petition and had made, while so insolvent, certain preferences. The bank was not actually a party to the bankruptcy proceedings and had taken no part therein. The trial court held that this evidence was not only admissible but established conclusively that the debtor was insolvent throughout the four months; and it entered judgment for the trustee which was affirmed by the Supreme Court of Michigan. Johnson v. Gratiot County State Bank, 193 Mich. 452. The case comes here on writ of certiorari. 243 U. S. 645. The only question presented is whether the state courts erred in holding that the record of the adjudication made the fact of insolvency at the time of the payments res judicata as against the bank.

First. The trustee contends that adjudication in bankruptcy, being in the nature of a judgment in rem, establishes not only the status of the debtor as a bankrupt, but also the essential findings of fact on which that judgment was based. The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all the world. Compare Shawhan v. Wherritt, 7 How. 627, 643. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally. Michaels v. Post, 21 Wall. 398, 428. New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, 661, 662. Compare Hebert v. Crawford, 228 U. S. 204, 208, 209. But an adjudication in bankruptcy, like other judgments in rem, is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto. Manson v. Williams, 213 U. S. 453, 455.[1] This court applied the principle in Wood v. Davis, 7 Cranch, 271, where a judgment that a mulatto woman was born free was held, as between strangers, not conclusive that her children were free. The rule finds abundant illustration in cases dealing with decedents' estates, Tilt v. Kelsey, 207 U. S. 43, 52; Brigham v. Fayerweather, 140 Mass. 411; and in cases involving the marriage status, Luke v. Hill, 137 Ga. 159; Burlen v. Shannon, 3 Gray 387; Wilson v. Mitchell, 48 Colo. 454, 469; Corry v. Lackey, 105 Mich. 363; Belknap v. Stewart, 38 Neb. 304; Gill v. Read, 5 R. I. 343.

Second. The trustee contends, however, that since by §§ 18b and 59f of the Bankruptcy Act, any creditor is entitled to intervene in the bankruptcy proceedings, the bank should be considered a party thereto. These sections are permissive, not mandatory. They give to a creditor, who fears that he will be prejudiced by an adjudication of bankruptcy, the right to contest the petition. Whether he does so or not, he will be bound, like the rest of the world, by the judgment, so far as it is strictly an adjudication of bankruptcy. But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the litigation and, as such, unaffected by the decision of even essential subsidiary issues. In

1—The court here cites, in the margin: In re Henry Ulfelder Clothing Co. (D. C.) 98 Fed. 409, 413, 414; In re Schick, 2 Ben. 5, Fed. Cas. No. 12,455; Silvey & Co. v. Tift, 123 Ga. 804; Durant v. Abendroth, 97 N. Y. 132; Lewis v. Sloan, 68 N. C. 557, 562, 563.

re McCrum, 214 Fed. 207, 213; Cullinane v. Bank, 123 Iowa, 340, 342. The rule is general that persons who might have made themselves parties to a litigation between strangers, but did not, are not bound by the judgment.[2] Compare Western Union Tel. Co. v. Foster, 247 U. S. 105, 115. No good reason exists for making an exception in the case of bankruptcy proceedings.

The purpose of Congress in expressly authorizing creditors, as well as the debtor, to answer an involuntary petition in bankruptcy was to guard against an improvident adjudication and to protect those whose peculiar interests might be prejudiced by establishing the status of bankruptcy. See Blackstone v. Everybody's Store, 207 Fed. 752, 756; Jackson v. Wauchula Mfg. & Timber Co., 230 Fed. 409, 411. The grant of this right of intervention was harmonized with the general purpose of Congress to secure a prompt adjudication, by requiring that the appearance and answers of creditors be made within five days after the return day on the petition. Had the adjudication been made determinative also of claims of the several creditors against the estate or of claims of the estate against individual creditors, such expedition in proceedings would be impossible, if each of the many widely scattered creditors is to be afforded a fair opportunity to be heard. Furthermore, to require every creditor to acquaint himself with the issues raised in every proceeding in bankruptcy against his debtors, in order to determine whether a decision on any such issue might conceivably affect his interests; and, if so, either to participate in the litigation, or, at his peril, suffer the decision of every question therein litigated to become res judicata as against him, would be an intolerable hardship upon creditors. And the resulting volume of litigation would often so delay the adjudication as to defeat the purposes of the Bankruptcy Act.

The unreasonableness of the rule contended for by the trustee is well illustrated in cases of alleged fraudulent preference. The claim may be made in respect to any creditor paid off within four months of the filing of an involuntary petition, that he received a fraudulent preference. Is every such former creditor to be deemed an existing creditor within the meaning of §§ 18b

2—The court here cites, in the margin: Lee v. School District, 149 Iowa 345, 354; Weber v. Mick, 131 Ill. 520, 529; State v. Johnson, 123 Mo. 43, 55; Hickox v. Eastman, 21 S. D. 591, 595; Carney v. Emmons, 9 Wis. 114, 117.

and 59f and a party to the bankruptcy proceeding? Compare Keppel v. Tiffin Savings Bank, 197 U. S. 356. And shall the decision of the bankruptcy court be binding on all these former creditors in respect to individual claims, although that court could not (without consent) obtain jurisdiction of any creditor who is not a resident of the district in which it sits, Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 311; and would not (prior to the Act of February 5, 1903, c. 487, §§ 8, 13, 32 Stat. 797, 798, 800) have had jurisdiction, even as against a resident creditor, of a claim to recover a fraudulent preference; such claim being enforceable (without consent) only in courts of general jurisdiction, Bardes v. Hawarden Bank, 178 U. S. 524; Wall v. Cox, 181 U. S. 244; Jaquith v. Rowley, 188 U. S. 620, and, even now, only by plenary suit, Louisville Trust Co. v. Comingor, 184 U. S. 18; Babbitt v. Dutcher, 216 U. S. 102, 113.

The decisions of the lower federal courts upon which the state court relied [3] in holding that §§ 18b and 59f made all creditors parties to the proceeding so as to render the adjudication binding on them as to all essential issues, clearly misconceived the intention of Congress. The allegation in the involuntary petition that the bank was among those who had received preferences, did not impose upon it the duty to appear and answer; and since it did not do so, even a finding to that effect by the bankruptcy court would not have bound it. The Supreme Court of Michigan erred in holding that the adjudication in bankruptcy established conclusively as against the bank that the debtor was insolvent at the time the payments were made. We have no occasion to consider whether the record introduced was admissible merely as evidence of insolvency. Reversed.

3—The court here says, in the margin: "Cook v. Robinson, 194 Fed. 785; In re American Brewing Co., 112 Fed. 752; Bear v. Chase, 99 Fed. 920. See also Lazarus v. Eagen (D. C.) 206 Fed. 518. In re Hecox, 164 Fed. 823, also relied upon, is a case of a different character. There, as in Shawhan v. Wherritt, 7 How. 627, 643, one not actually a party to the proceeding sought to attack the legislative effect of the adjudication—and it was properly held to be conclusive. Hackney v. Hargreaves Bros. (Hackney v. Raymond Bros. Clarke Co.) 68 Neb. 633, 639, involved only the admissibility of the schedule of liabilities as evidence tending to prove insolvency."

STELLWAGEN v. CLUM

245 U. S. 605, 62 L. ed. 507, 38 Sup. Ct. 215

(United States Supreme Court. February 4, 1918)

Mr. Justice DAY delivered the opinion of the Court.

This case is here upon certificate from the United States Circuit Court of Appeals for the Sixth Circuit. From the statement accompanying the certificate it appears that Stellwagen, trustee for Margaret Zengerle, filed a petition in the United States District Court to require the surrender and transfer to him of a quantity of white pine lumber and balance due upon a certain open account then in possession of Clum as trustee in bankruptcy of the Georgian Bay Company. The order was denied, the petition dismissed, and appeal taken to the Circuit Court of Appeals.

The questions are whether certain provisions of the statutes of Ohio are suspended by virtue of the Bankruptcy Act of 1898. The facts upon which the questions arise, and in view of which they are to be answered, are thus stated:

"The Georgian Bay Company, an Ohio corporation, was at the time of the transactions in dispute engaged in the wholesale and retail lumber business at Cleveland, Ohio. February 2, 1910, the company delivered to appellant's predecessor (A. L. McBean), as trustee for Margaret Zengerle and the Dime Savings Bank of Detroit, its bill of sale, describing 433,500 feet of white pine lumber then in the company's yards, and stating a total price of $14,013; crediting the trustee with certain promissory notes of the company for a like sum and payable in different amounts, to the order of Margaret Zengerle, C. M. Zengerle, agent, and the Dime Savings Bank, respectively. Neither the bill of sale nor a copy was filed with the recorder of Cuyahoga county, Ohio; but the lumber so in terms sold consisted of piles (stacked in the ordinary way) which were to be and at the time in fact were each distinctly marked: 'Sold to A. L. McB., Agt.' May 3, 1910, the company with consent of McBean sold this lumber and certain of its own lumber then in the yards, to Schuette & Co. of Pittsburgh. Payment was to be made by Schuette & Co., part in cash, part in notes maturing at fixed times between date of sale and the following September 10th and the balance in cash on or before October 1st.

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should be answered in the negative, and it is unnecessary to answer Question C.

So ordered.

DEAN v. DAVIS

242 U. S. 438, 61 L. ed. 419, 37 Sup. Ct. 130

(United States Supreme Court. January 8, 1917)

Mr. Justice BRANDEIS delivered the opinion of the court.

The Bankruptcy Act as amended February 5, 1903, provides in § 60b that if a debtor has, within four months before the filing of the petition in bankruptcy, made a transfer which the person receiving the same has reason to believe was intended to give a preference, the transfer shall be voidable, and the trustee in bankruptcy may recover the property or its value. The act also provides in § 67e (30 Stat. 564), that if a debtor, within four months before the filing of the petition in bankruptcy, makes any transfer "with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them," it shall be null and void except as to purchasers in good faith and for a present fair consideration; and that it shall be the duty of the trustee to recover the same.

R. Crawley Jones was a farmer and owner of a country store. A bank, having discounted his notes bearing indorsements which it later concluded had been forged, demanded that Jones take up the notes. Fearing arrest, he appealed, through his father to his brother-in-law, Dean, for a loan of $1,600, promising to secure it by a mortgage of all his property, which he represented was worth more than five times that amount. Dean provided the money, and on September 3, 1909, acting in conjunction with Jones' father, "took up" the notes. Most of them were not yet due. A mortgage deed of trust dated September 3 was executed September 10, and recorded September 11. It covered practically all of Jones' property, including the stock in trade and accounts, store furnishings and fixtures, household furniture and goods, live stock, crops standing and cut, and the farm itself, the last subject to a prior deed of trust. Four mortgage notes were given, payable respectively in seven, thirty, sixty, and ninety days; with a proviso that upon default on any one all should become payable. The first note—and hence all—were overdue when the mortgage was recorded. On that day Dean di-

rected that possession of the property be taken, which was done on September 13 (the 12th being Sunday). Jones was at the time deeply insolvent and had many unsecured creditors. Some of these immediately challenged the validity of the mortgage. Within a few days an involuntary petition in bankruptcy was filed and Jones was adjudicated a bankrupt. The mortgaged property was converted into cash under an agreement with general creditors that it should be deposited to await the ultimate determination of the rights of the parties. It yielded only $1,634 —leaving nothing for the general creditors if the mortgage is held valid.

Davis, the trustee in bankruptcy, brought a bill in equity to set aside the mortgage. The District Court granted the relief prayed for; and its decree was affirmed by the Circuit Court of Appeals. Both courts found the facts to be in substance as above stated and held the mortgage void under § 67e as having been made by Jones "with the intent and purpose on his part to hinder, delay or defraud his creditors," to one not a "purchaser in good faith" within the meaning of the act. The Circuit Court of Appeals held the mortgage void also as a preference under § 60b, 212 Fed. 88. The case comes to this court upon appeal; Dean contending that the mortgage is not invalid under either § 60b or § 67e.

The mortgage was not voidable as a preference under § 60b. Preference implies paying or securing a pre-existing debt of the person preferred. The mortgage was given to secure Dean for a substantially contemporary advance. The bank, not Dean, was preferred. The use of Dean's money to accomplish this purpose could not convert the transaction into a preferring of Dean, although he knew of the debtor's insolvency. Mere circuity of arrangement will not save a transfer which effects a preference from being invalid as such. National Bank v. National Herkimer County Bank, 225 U. S. 178, 184. But a transfer to a third person is invalid under this section as a preference only where that person was acting on behalf of the creditor, as in Re Beerman, 112 Fed. 663, and Walters v. Zimmerman, 208 Fed. 62, 220 Fed. 805. Here Dean acted on the debtor's behalf in providing the money and taking up the notes.

But under § 67e the basis of invalidity is much broader. It covers every transfer made by the bankrupt "within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of

them" "except as to purchasers in good faith and for a present fair consideration." As provided in § 67d, only "liens given or accepted in good faith and not in contemplation of or in fraud upon this act" are unassailable. A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, "hinders, delays or defrauds creditors" within the meaning of § 67e. Van Iderstine v. National Discount Co., 227 U. S. 575, 582, points out the distinction between the intent to prefer and the intent to defraud. A transaction may be invalid both as a preference and as a fraudulent transfer. It may be invalid only as a preference or only as a fraudulent transfer. Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay, or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect "good faith." But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated. The fact that the money advanced is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made.

We cannot say that the facts found by the District Court and affirmed by the Circuit Court of Appeals were not supported by the evidence, nor that these courts erred in concluding upon this evidence that the mortgage was made with the purpose and intent to hinder, delay, or defraud Jones' creditors, and that Dean was not, as against general creditors, "a purchaser in good faith." Jones knew that he was insolvent. He knew that he was making a preferential payment. He must have known that suspension of his business and bankruptcy would result from giving and recording a mortgage of all his property to secure a note which had matured before the mortgage was executed. The lower courts were justified in concluding that he intended the necessary consequences of his act; that he willingly sacrificed his property and his other creditors to avert a threatened criminal prosecution; and that Dean, who, knowing the facts, co-operated

in the bankrupt's fraudulent purpose, lacked the saving good faith.

The conclusion reached by the lower courts is supported by many decisions of the several District Courts and Circuit Courts of Appeals, which are referred to in the margin.[1] It is in harmony with both the Van Iderstine Case, and Coder v. Arts, 213 U. S. 223, 244, upon which appellant particularly relies. In each of these cases this court refused to hold fraudulent in law a transfer which the Circuit Court of Appeals had found to be innocent in fact. In the Van Iderstine Case, where a pledge was held valid, the Circuit Court of Appeals had expressly found that the pledgee was without knowledge of the debtor's fraudulent intent, if such there was. In Coder v. Arts, where a mort-

1—The court here says, in the margin: "Cases holding that a mortgage is a fraudulent conveyance where taken as security for a loan which the lender knows is to be used to prefer favored creditors, in fraud of the act: Parker v. Sherman, 129 C. C. A. 437, 212 Fed. 917 (C. C. A. 2d Circuit); Re Soforenko, 210 Fed. 562 (D. C. Mass.); Johnson v. Dismukes, 122 C. C. A. 552, 204 Fed. 382 (C. C. A. 5th Circuit); Lumpkin v. Foley, 122 C. C. A. 542, 204 Fed. 372 (C. C. A. 5th Circuit); Re Lynden Mercantile Co., 156 Fed. 713 (D. C. Wash.); Roberts v. Johnson, 81 C. C. A. 47, 151 Fed. 567 (C. C. A. 4th Circuit); Re Pease, 129 Fed. 446 (D. C. Mich.). See also Walters v. Zimmerman, s. c. on appeal, 208 Fed. 62 (D. C. Ohio), 220 Fed. 805 (C. C. A. 6th Circuit).

"Cases upholding the mortgage security because the lender did not know that the insolvent borrower intended to make improper payments to favored creditors—thus indicating that the mortgage would be fraudulent if such additional fact were shown: Grinstead v. Union Savings & Trust Co., 190 Fed. 546 (C. C. A. 9th Circuit); Powell v. Gate City Bank, 178 Fed. 609 (C. C. A. 8th Circuit); In re Kulberg, 176 Fed. 585 (D. C. Minn.); Ohio Valley Bank Co. v. Mack, 163 Fed. 155 (C. C. A. 6th Circuit); Stedman v. Bank of Monroe, 117 Fed. 237 (C. C. A. 8th Circuit); In re Soudan Mfg. Co., 113 Fed. 804 (C. C. A. 7th Circuit).

"In accord with this view are also the decisions which hold that a general assignment for the benefit of creditors, though without preferences, is void under § 67e because its necessary effect is to hinder, delay or defraud creditors in their rights and remedies under the Bankruptcy Act. In re Gutwillig, 90 Fed. 475, 92 Fed. 337; Davis v. Bohle, 92 Fed. 325; Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co., 99 Fed. 699. See Randolph v. Scruggs, 190 U. S. 533, 536; West Co. v. Lea, 174 U. S. 590, 596.

"It is difficult to reconcile the following cases or dicta in them with the great weight of authority and the decisions of this court. In re Baar, 213 Fed. 628 (C. C. A. 2nd Circuit); In re Hersey, 171 Fed. 1004 (D. C. Iowa); Sargent v. Blake, 160 Fed. 57 (C. C. A. 8th Circuit); In re Bloch, 142 Fed. 674 (C. C. A. 2nd Circuit); Githens v. Shiffler, 112 Fed. 505 (D. C. Pa.)."

gage was held valid, the Circuit Court of Appeals had found that, in making the mortgage, the debtor has no intent to hinder, delay, or defraud creditors, and this court said that, "in view of the finding of the Circuit Court of Appeals, it may be that [he] though including in the conveyance a large amount of his property, acted in good faith, with a view to preserving his estate and enabling him to meet his indebtedness." This court, while declaring itself bound by the facts so found, was careful to express its dissent from the view "that the giving of the mortgage and its effect upon other creditors could not be considered as an item of evidence in determining the question of fraud."

Dean contends also that relief should not have been granted under § 67e because the bill was framed under § 60b. The objection was not taken in the District Court, although the question of invalidity under § 67e was elaborately discussed on demurrer to the bill as well as upon final hearing. Twenty-five other errors were assigned on the appeal to the Circuit Court of Appeals. This objection was not raised then. It was insisted only that the evidence did not warrant the finding of fraudulent intent. Section 60b seems to have been mainly in the mind of the pleader when the bill of complaint was drafted, but not exclusively, for it alleges that the plaintiff as trustee was entitled "to recover property transferred by said bankrupt in fraud of his creditors." The answer expressly alleges that the mortgage was accepted "without any intent or purpose of aiding said Jones to defraud, delay, or hinder his creditors, and not in contemplation of or in fraud of the bankrupt act, or any of its provisions, believing him to be solvent, and that he would continue his business." The issue of fraudulent transfer was presented by the pleadings, was fully tried, and was found against the appellant. No error was committed.

Decree affirmed.

CAREY v. DONOHUE

240 U. S. 430, 60 L. ed. 726, 36 Sup. Ct. 386

(United States Supreme Court. March 13, 1916)

Mr. Justice HUGHES delivered the opinion of the court.

This suit was brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt of certain real estate. Upon appeal from a decree in favor of the trustee, it was held by

the Circuit Court of Appeals that the case had been tried, and the decree was based, upon the theory of preference voidable under the Bankruptcy Act, and for the purpose of appropriate amendment to conform the bill to the proof, the decree was reversed and the cause was remanded. 209 Fed. 328. The amendment was made accordingly, and the decree was re-entered and affirmed. 213 Fed. 1021.

The petition in involuntary bankruptcy was filed on January 3, 1911, and the adjudication was had on January 24, 1911. The following facts appear from the findings: On August 6, 1910, John E. Humphreys (the bankrupt) executed and delivered to Walter J. Carey (the appellant) the deed in question. It was left for record on November 15, 1910, with the recording officer of the proper county, and was recorded. Humphreys was insolvent at the time of the execution of the deed, and Carey at that time had reasonable cause to believe that such transfer to him, if made, would effect a preference, being given in payment of an antecedent debt. On December 31, 1910, Carey conveyed the property to innocent purchasers, this deed being left for record on January 3, 1911. It was held that the latter conveyance placed the property itself beyond the reach of the court; and judgment was given in favor of the trustee and against Carey for the value of the property as found by a jury, with provision for the payment by the trustee to the wife of the bankrupt of the estimated value of her inchoate right of dower.

We are not concerned with the provisions of the Ohio statute relating to preferences (General Code, §§ 11,104, 11,105),—a statute which provides a different test of liability from that of § 60 of the Federal act pursuant to which the recovery was had. (209 Fed. 331, 332.) The sole question presented for the consideration of this court is whether the deed executed by the bankrupt was one which was "required" to be recorded within the meaning of this section. If it was not, there could be no recovery of the property under § 60, as the deed was executed and delivered more than four months before the petition in bankruptcy was filed. If the deed was required to be recorded in the sense of the statute, it is clear that the trustee was entitled to recover, as the recording was within the four months' period and the other conditions of recovery were satisfied.

The provision for the recording of the deed is found in § 8543 of the General Code of Ohio, which follows the requirement for

the recording of mortgages and powers of attorney. The section reads:

"Section 8543. All other deeds and instruments of writing for the conveyance or encumbrance of lands, tenements, or hereditaments executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of the purchase, no knowledge of the existence of such former deed or instrument."

Referring to this section, the Supreme Court of Ohio said in Dow v. Union Nat. Bank, 87 Oh. St. 173, 181: "This provision of the statute must be accepted as exclusively defining the consequences which follow a failure to file a deed for record, and there being mere neglect, unaccompanied by any fraudulent conduct or representation on the part of the grantee, no right can accrue to anyone other than such bona fide purchaser." Accordingly, it was held that the mere failure to record a deed did not render it invalid as to creditors of the grantor although they became such on the faith of his representation that he was still the owner of the property conveyed. This decision applied the ruling in Wright v. Franklin Bank, 59 Oh. St. 80, 92, 93, where it was said: "Lands held by a properly executed but unrecorded deed are also free from the debts of the grantor, whether attempted to be reached in an assignment for the benefit of creditors made by him, or upon an attachment, judgment, or execution against him. The title under such a deed is good as against everything except a subsequent bona fide purchaser without notice. * * * Mortgages so executed, whether on an estate in real property or on only an interest therein, take effect from the time of the delivery to the recorder, and deeds so executed, conveying the estate or only an interest therein, that is, an equity, take effect from delivery, except as against subsequent bona fide purchasers without notice, and as against such the deed must be also recorded." In the present case, the Court of Appeals was satisfied that in equity the instrument (which was absolute in form) should be treated as a mortgage, but the court did not think this to be important because of the holding of the Ohio court that an instrument in this form, "unlike a legal mortgage, operates upon delivery to transfer title and so is required to be recorded as a deed." 209 Fed. 334, 335;

Kemper v. Campbell, 44 Oh. St. 210, 218; Wright v. Franklin Bank, 59 Oh. St. 95; Cole v. Merchants Nat. Bank, 15 Ohio C. C. (N. S.) 315, 347.

Under these decisions, then, we assume that there was no requirement that this conveyance should be recorded in order to give it validity as against any creditor of the bankrupt, whether a general creditor, or a lien creditor, or a judgment creditor with execution returned unsatisfied; that is, as against any class of persons represented by the trustee or with whose "rights, remedies, and powers" he was to be deemed to be vested. Bankruptcy Act, § 47a. This fact, the appellant contends, makes recovery impossible under § 60; while the appellees insist that the provision in the interest of subsequent bona fide purchasers constitutes a requirement of recording which entitles a trustee to recover for the benefit of creditors. With respect to the construction of the clause in question, there has been diversity of opinion in the Circuit Courts of Appeals. In the Sixth, Seventh, and Eighth Circuits, the view has been taken that the word "required" refers "to the character of the instrument giving the preference" without regard to the persons in whose favor the requirement is imposed; that is, if the transfer is required to be recorded as to anyone, the trustee may recover if it has not been recorded more than four months before the filing of the petition in bankruptcy. See Loeser v. Savings Bank (C. C. A. Sixth), 148 Fed. 975, 979 (followed by the decision in the present case); In re Beckhaus (C. C. A. Seventh), 177 Fed. 141 (see In re Sturtevant (C. C. A. Seventh), 188 Fed. 196); First Nat. Bank v. Connett (C. C. A. Eighth), 142 Fed. 33, 36; Mattley v. Giesler (C. C. A. Eighth), 187 Fed. 970, 971. A different conclusion has been reached in the Second, Fifth, and Ninth Circuits. See In re Boyd (C. C. A. Second), 213 Fed. 774; Meyer Drug Co. v. Pipkin Drug Co. (C. C. A. Fifth), 136 Fed. 396; In re McIntosh (C. C. A. Ninth), 150 Fed. 546; also In re Hunt (D. C. N. Y.), 139 Fed. 283.

In its original form, § 60 made no reference to record. 30 Stat. 562. The four months ran from the time of the giving of the preference, and if this period had elapsed when the bankruptcy proceeding was instituted, there could be no recovery under § 60, whether the transfer had, or had not, been recorded. See Humphrey v. Tatman, 198 U. S. 91; Rogers v. Page, 140 Fed. 596, 599. But a different rule was established for computing the time within which a petition in bankruptcy might

be filed. In § 3b, it was provided that the four months' period should not expire "until four months after (1) the date of the recording or registering of the transfer * * * when the act consists in having made a transfer * * * for the purpose of giving a preference * * * if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer." 30 Stat. 546, 547. This distinction between the test of the right to institute bankruptcy proceedings and the test of the right to recover from one who had received a transfer alleged to be a preference lay in the terms of the act and could not rightly be ignored. It was urged that the result was to encourage secret preferential transactions; but the wisdom of the prescribed condition of recovery from the preferred creditor, and the advisability of conforming the provision of § 60 to that of § 3b was a matter for legislative, not judicial, consideration. To secure this conformity, an amendment to § 60 was proposed in Congress in the year 1903. As passed by the House of Representatives, it added to § 60a the following clause: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted, or if not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property transferred." Cong. Rec. 57th Cong. 1st Sess. vol. 35, pt. 7, pp. 6938, 6943. The Senate struck from this proposed amendment all that follows the words, "if by law such recording or registering is required," and as thus limited the amendment was adopted by Congress. Cong. Rec. 57th Cong. 2d Sess. vol. 36, pt. 1, p. 1036; act of Feb. 5, 1903, chap. 487, 32 Stat. 797, 799, 800; In re Hunt, 139 Fed. 286. There is no basis for the assumption that the words which the House of Representatives had desired to add were ultimately deemed to be surplusage, for these words had an obviously distinct significance and they had been included in § 3b, which in this respect remained unchanged. We cannot but regard the action of Congress as a deliberate refusal to conform the requirements of § 60 to those of § 3b, and we are not at liberty to supply by construction what Congress has clearly shown its intention to omit. It should also be observed that § 60 was again under

consideration by Congress in the year 1910, and it was again amended; but the last sentence of § 60a, as inserted in 1903, was left unaltered. And the same conditional clause—"if by law recording or registering thereof is required"—was used in the amended subdivision b. Whatever argument is made for an extension of the clause, in order more completely to conform it to the language of § 3b, we must disregard as addressed to a matter solely of legislative policy.

As Congress did not undertake in § 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred. The character of the transfer itself, both with respect to what should constitute a transfer and its preferential effect, had been carefully defined. It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording. But in dealing with a transfer, as defined, which, though valid as between the parties, was one which was "required" to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision. The natural, and, we think, the intended, meaning, was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the Bankruptcy Act. See Senate Report, No. 691, Sixty-first Cong. 2d Sess., p. 8. In the present case, there was no requirement of recording in favor of creditors, either general creditors or lien creditors. The requirement of the applicable law was solely in favor of subsequent bona fide purchasers without notice. These subsequent purchasers are entirely outside of the purview of the Bankruptcy Act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause "if by law recording or registering thereof is required" had any reference to requirements

in the interest of persons of this description. The limitation of the provision to those transfers which are "required" to be recorded under the applicable law is not to be taken to be an artificial one by which the rights of creditors are made to depend upon the presence or absence of local restrictions adopted, *alio intuitu*, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors,— the persons interested in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act. And where, as in this case, there is no such requirement, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under § 60.

In this view, the decree must be reversed and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

MARTIN v. COMMERCIAL NATIONAL BANK

245 U. S. 513, 62 L. ed. 441, 38 Sup. Ct. 176

(United States Supreme Court. January 14, 1918)

Mr. Justice McREYNOLDS delivered the opinion of the court.

As security for money presently loaned to him in good faith by the Commercial National Bank, one Virgin executed and delivered a mortgage upon his stock of merchandise at Macon, Georgia, February 16, 1914. It was recorded August 20, 1914, when the bank knew of his insolvency. The next day involuntary bankruptcy proceedings were instituted and in due time he was adjudged bankrupt and a trustee appointed. Recordation of the mortgage was not fraudulently delayed and prior thereto no other liens were fixed upon the property. Both trustee and other creditors objected to the bank's claim as one entitled to priority "on the ground that the mortgage was recorded within the four months period preceding bankruptcy, at a time when the mortgagor was insolvent, and when the mortgagee knew that he was insolvent, and that the recording of the mortgage would effect a preference, and that the transfer arising from the recording of the instrument was nonoperative, and that the instrument must be held as not recorded." Their contention here is thus stated:

"The trustee does not say in this case that his lien is older

than the bank's and therefore he comes ahead of the bank, but he says that the bank's lien is invalid and inoperative, because recorded while the bankrupt was insolvent, etc., and that, being a subsequent lienholder, the trustee is in the proper position to attack the bank's lien. The bank's lien is invalid only by the positive inhibition of the statute, section 60b. It is for this reason invalid just as a transfer made (instead of recorded) within this four months' period is invalid by reason of the inhibition of the Bankruptcy Law." "The record of an instrument is required as to any particular person if the instrument must be recorded to be good against him. If the subsequent lienor is entitled to priority unless the antecedent mortgage is recorded, such mortgage is required to be recorded as to him. The trustee is a subsequent lienor. Unless the mortgage is recorded he, the trustee, is entitled to priority. It is therefore 'required' to be recorded as to him."

The referee allowed the claim as preferred and the Circuit Court of Appeals approved his action. 228 Fed. 651.

* * * Section 3260, Georgia Code of 1910, declares that "Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded mortgage, or the purchaser has the like notice, then the lien of the older mortgage shall be held good against them." Construing this section, in Hawes v. Glover, 126 Ga. 305, 317, the Supreme Court held: "A mortgage is perfectly valid as between the parties thereto, though never recorded. Hardaway v. Semmes, 24 Ga. 305; Gardiner v. Moore, 51 Ga. 268; Myers v. Picquet, 61 Ga. 260; Civil Code, § 2727 (Park's Ann. Code, § 3260). If it is not recorded, or, as in this case, is illegally recorded, the only effect is to postpone it to purchases made, or liens procured by contract, without notice of its existence or to liens obtained by operation of law."

Section 60b, Bankruptcy Act, has been specially considered by us in two recent cases—Bailey v. Baker Ice Machine Co., 239 U. S. 268, and Carey v. Donohue, 240 U. S. 430. In the first the company installed an ice machine for Grant Brothers at Horton, Kansas, during February, under a conditional sale contract of earlier date and recorded May 15th following, when the purchasers were known to be insolvent; July 11th they be-

came bankrupt. Such a contract is valid under the laws of Kansas as between the parties whether recorded or not, but void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment or like process prior to recording. The vendors demanded the machine. The trustee maintained § 47a, Bankruptcy Act, gave him the status of a lienholder prior to recordation and that the contract, having been put to record within four months, operated as a preference voidable under § 60b. We held the trustee occupied the status of a creditor with a lien fixed as of the date when the bankruptcy proceedings commenced and that he could not assail the contract under the state law; further, that § 60b refers to an act whereby the bankrupt surrenders or incumbers his property for the benefit of a particular creditor, thereby diminishing the estate which should be applied to all; the contract in question did not operate as a preferential transfer; the property was not the bankrupts'; but the vendor's; the former were not to become owners until the condition was performed; and there was no diminution of the estate.

In Carey v. Donohue the trustee sought to set aside a real estate transfer executed more than four months before bankruptcy, but recorded within that time. Under the Ohio statute conveyances of land until filed for record are deemed fraudulent as to subsequent bona fide purchasers without knowledge, but recording is not essential to their validity as against any creditor, whether general creditor, lien creditor, or judgment creditor with execution returned unsatisfied, that is, as against any class of persons represented by a trustee in bankruptcy or with whose rights, remedies, and powers he is deemed to be vested. We denied the trustee's contention and, among other things, declared: "Required" has regard to persons in whose favor the requirement is imposed. "Congress did not undertake in § 60 to hit all preferential transfers (otherwise valid), merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceedings." "It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording." "In dealing with a transfer, as defined, which, though valid as between the parties, was one which was 'required' to be recorded, the refer-

ence was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision." "The intended meaning was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take."

The word "required" in § 60b refers directly to statutes in many states relating to recording which through various forms of expression seek to protect creditors by providing that their rights shall be superior to transfers while off the record. Recognizing the beneficial results of these enactments and intending that rights based thereon might be utilized for the advantage of bankrupt estates, Congress inserted (amendment of 1910) the clause "or of the recording or registering of the transfer if by law recording or registering thereof is required." In Carey v. Donohue we pointed out that purchasers are not of those in whose favor registration is "required," but that the reference is to persons concerned in the distribution of the estate, i. e., "creditors including those whose position the trustee was entitled to take." And we think it properly follows that before a trustee may avoid a transfer because of the provision in question he must in fact represent or be entitled to take the place of some creditor whose claim actually stood in a superior position to the challenged transfer while unrecorded and within the specified period.

The Georgia statute imposes the requirement of registration only in favor of a creditor who fixes a lien on the property before recording takes place. Here there is no such person—the trustee occupies the status of one who acquired a lien after that event. No one concerned in the distribution of the estate actually held rights superior to the mortgage while off the record.

The judgment of the court below is correct, and must be

Affirmed.

In re IRISH

228 Fed. 573

(District Court, E. D. Pennsylvania. December 28, 1915)

DICKINSON, District Judge. This case has taken on a very practical phase and is disposed of with this in view. The real

question involved is whether an insolvent, whose sole disclosed asset is real estate, may confess a judgment to his wife in an amount fully equal to the value of the real estate, and through the lien thus acquired absorb all the assets, and by merely withholding execution escape bankruptcy proceedings against him. The petition of creditors as filed avers what was done to have been the act of bankruptcy set forth in clause (3) of section 3a. It has been authoritatively ruled by the courts of this district that the things charged to have been done by the bankrupt do not constitute the act of bankruptcy set forth in this clause. This has been since settled for us as the law in Citizens' Banking Co. v. Ravenna Bank, 234 U. S. 360.

We have in consequence the admission of counsel for petitioning creditors that the petition is not self-supporting. This situation is met by a request to amend, so that the petition may aver the acts of bankruptcy defined in clauses (1) and (2) of the same section. It is argued for petitioners that the cause may proceed to an adjudication on these grounds, if unchallenged by an answer. Apparently counsel for the bankrupt feel embarrassed in meeting this argument, because the facts upon which the judgment of the court must proceed do not get upon the record until the amended petition has been filed. They, in consequence, adhere to the position that the present petition discloses no basis for an adjudication, and the proceedings, because of this, should be dismissed. To meet this situation we allow an amendment to the petition to be filed averring any act of bankruptcy which the petitioners may feel justified in alleging, provided the amended petition is kept within the general scope of the facts set forth in the original petition. Such amended proceedings will be subject to any motion which the bankrupt may make, or the bankrupt may make answer thereto, as if said amended petition had been originally filed.

If such amended petition be not filed in 10 days, an order dismissing the proceedings may be entered.

In re IRISH

238 Fed. 411

(District Court, E. D. Pennsylvania. December 22, 1916)

DICKINSON, District Judge. Aside from the mere formality of statement in the petition, the real question involved in this

motion can be most clearly presented in two propositions. One is whether an insolvent debtor, who is the owner of real estate which he desires and intends to convey or transfer out of the reach of creditors, and intends further to defraud creditors or to prefer one of them, and for the accomplishment of this purpose confesses a judgment for a sum in excess of the value of the property, execution upon which judgment, however, is withheld until after four months from the entry of the judgment, has committed an act of bankruptcy under clauses 1 or 2 of section 3a. The other proposition is whether such act is a cause of bankruptcy, if, instead of confessing the judgment, the insolvent debtor, for the same purpose and intent as before stated, is a party to the bringing of an action against himself and the entry of a like judgment by default.

The substantial question above stated is formally raised by the petition in this case. It avers an act of bankruptcy in the language of clause 1 and also in the language of clause 2, but the positive averments thus made are qualified by the statement that the conveyance or transfer charged to have been made was made through the expedient or device of the recovery of a judgment such as outlined above. The real question is, we think, involved in the first proposition, because we are of opinion that there is no distinction between the judgments entered in the different ways mentioned.

The weight of the argument in favor of the motion to dismiss is felt in the expression of the thought that Congress has made a distinction between the confession of a judgment and the conveyance or transfer of property similar to that which was recognized by the courts of Pennsylvania under the acts regulating assignments for the benefit of creditors. The distinction is between a conveyance or other transfer through the operation of which title to property directly passes and the confession of a judgment through an execution upon which title to property may indirectly but eventually pass. Based upon this distinction, the courts of Pennsylvania held that a judgment confessed to a trustee for creditors was not an assignment for the benefit of creditors, notwithstanding the fact that the entry of the judgment was immediately followed by the issuing of an execution through and by which the property of the defendant, real or personal, was sold and transferred.

The argument has further weight in the attitude of the professional mind on the subject of confessed judgments unaccom-

panied with execution, and in the consideration that the mere entry of a judgment left creditors free to pursue all lawful remedies which were theirs. There is also room for the thought that the bankruptcy laws embodied the policy of Congress not to force bankruptcy proceedings upon a struggling debtor unless certain clearly defined causes of bankruptcy existed, and that the thought of Congress was that it would be unwise to make the mere entry of a judgment an act of bankruptcy, because this would hamper needy defendants in getting aid through whatever credit they still retained.

The weight of the argument addressed to us on the other side resides in this: If the real intent and purpose of a debtor was the fraudulent one of withdrawing property from the reach of his creditors, or the unlawful one of securing payment to one creditor to the prejudice of others, and the means through and by which this is sought to be accomplished is, in substance and reality, a conveyance or transfer of his property, it is an intolerable thought that the law will sanction the accomplishment of this fraudulent or unlawful purpose out of deference to the mere form which the transaction may be made to assume. Each view is presented through arguments of almost equal strength, and the scales of judgment are left almost on a balance. The device to which this alleged bankrupt has had resort (if his purpose was as averred by the petitioning creditors) is so ancient and so common that at first blush it seems strange that the question has not been before raised and decided. Indeed the very common practice of failing debtors, after they had passed the verge of insolvency, to save their property to themselves or members of their families, or to prefer a friendly creditor through the device of a confessed judgment, has always been advanced by advocates of a bankrupt law as in itself a sufficient reason for the enactment of such a law. The change from a confessed judgment to a recovered judgment is but a step.

The fact that the specific question now raised has never before been definitely ruled is accounted for, on the one hand, by the assertion that no creditors before these petitioners have ever thought the question worth raising, and, on the other, by the conflicting assertion that no debtor has before thought that such a device as that here resorted to would be effective. It has, of course, been frequently ruled that the mere confession of a judgment without an accompanying execution is not a cause of bankruptcy within the meaning of clause 3. This is because

of the very terms of that clause. It has indeed, with the present acquiescence of the petitioning creditors, been so ruled in this very case. In re Irish (D. C.) 228 Fed. 573.

All considerations arising under clause 3 have been laid at rest for us by the ruling in Citizens' Bank v. Ravenna Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352, in which the conflicting views of policy which were settled by Congress are most clearly set forth. It is manifest, however, that the ruling in that case was confined to the quoted section of the act, and leaves untouched (otherwise than by implication) what constitutes a cause of bankruptcy under either clause 1 or clause 2. In order to bring the discussion down to the specific question now raised, it may be observed that the acts of Congress enumerate five distinct separate and different causes of bankruptcy. It may therefore be fairly assumed that Congress had in mind five different things which an alleged bankrupt might have done. Those designated as 4 and 5 we may dismiss as not here involved. The first condemns as a cause of bankruptcy the actual fraud of an insolvent debtor who attempts to put his property beyond the reach of his creditors by any conveyance, transfer, concealment, or removal, or by permitting such concealment or removal by others. The second visits a like condemnation upon the unlawful act of transferring property with the intent to prefer a creditor, although the debt be an honest one and there is no fraud in fact. The third condemnation is aimed at the act (otherwise lawful) of permitting a creditor to secure a judgment and proceed to a sale, coupled with the further negative act of not having prevented such creditor from procuring a preference. It will be observed that the thing which is declared to be a cause of bankruptcy is again one which may come about, not only without any intent on the part of the debtor to either commit actual fraud or to permit an unlawful preference, but may be something which he is powerless to prevent.

This brings us to the real broad question now presented of whether there may be another thing done by an insolvent, which Congress has not made a cause of bankruptcy, or whether this is included in clauses 1 or 2, to wit, confessing or permitting a judgment with the actual intent to defraud creditors, or with the unlawful intent to prefer a creditor through having the judgment ripen into a transfer of property.

It may be assumed that Congress meant the bankruptcy laws

to embrace all proper causes of bankruptcy, and, further, that it had in mind the device of entering judgments in order to defraud creditors or to give a preference, and also the practice of debtors who were struggling against insolvency to resort to confessed judgments as an honest means of raising money, as well as the possibility that a judgment might be entered against such a debtor by an uneasy creditor.

All these considerations constitute the balancing of advantages and disadvantages by Congress before declaring its will, to which reference is made in the opinion in the Ciitzens' Bank v. Ravenna Bank Case. That of which we are in search is this declared will. The thought is readily grasped that it was the purpose of Congress to include all such fraudulent and unlawful judgments in clauses 1 and 2. The thought is as easily grasped that Congress did not mean to interfere with needy or unfortunate debtors against whom judgments not followed by executions might be entered, and that they left this means of avoiding bankruptcy open to them, notwithstanding the use of such judgments might be abused by debtors actuated by a fraudulent or unlawful purpose.

A review of the authorities which the industry of counsel has brought to our attention may not be out of place, even at the cost of lengthening an already overlong opinion.

We pass the case of Wilson v. Bank, 84 U. S. (17 Wall.) 473, 21 L. Ed. 723, with the comment that it was ruled upon the question of the sufficiency of the evidence to support a finding of unlawful intent in a proceeding to avoid an alleged preference. The phrases quoted by counsel for the alleged bankrupt merely voice the two thoughts that there is nothing wrong in a debtor not resisting the collection of a just debt, nor can any inference of fraud be drawn from the mere fact that he interposed no defense to such an action.

Sleek v. Turner, 76 Pa. 142, and Louchheim v. Henzey, 86 Pa. 350, are to the same effect that "mere passive nonresistance of the defendant to the recovery of a judgment" for an honest debt will not justify (of itself) an inference of actual fraud or unlawful intent.

In considering the language of an opinion, we cannot be too often reminded that it must be read in the light of the subject-matter to which it relates. Some provisions of the acts of Congress discussed deal with the actual intent and purpose of the debtor or creditor, others denounce a particular act as unlaw-

ful because against the declared policy of the law, irrespective of the intent of the parties, or the otherwise innocent character of the act. The importance of this distinction is pointed out in the majority opinion in Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, wherein it is held that intent enters into clauses 1 and 2, but has no place in clause 3, which deals wholly with results.

It may be further observed that the broad question with which we are now dealing does not concern itself with the lexical meaning of the words employed, because Congress has carefully defined the sense in which the words are used. Nor is more than very general aid afforded by adjudged cases dealing with a different state of facts.

Pirie v. Chicago Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, for instance, merely rules that payment of moneys is a transfer of property within the meaning of the preference provisions of the act.

In the Nusbaum Case (D. C.) 18 Am. Bankr. Rep. 598, 152 Fed. 835, there was both a judgment and an execution sale. These were held to be a transfer within the meaning of the act, and to constitute a cause of bankruptcy under clause 1, and also clause 2, as well as clause 3, there being also present the actual intent to defraud and to prefer.

The Tupper Case (D. C.) 20 Am. Bankr. Rep. 824, 163 Fed. 766, is of value to us in the respect of the expression of the opinion that the omission of an averment of intent to defraud prevented the judgment there operating as a cause of bankruptcy under clause 1, and because of the implication that if such intent had been averred, a cause of bankruptcy would have been set forth.

In re Truitt (D. C.) 29 Am. Bankr. Rep. 570, 203 Fed. 550, approaches more closely to a ruling of the question before us. It rules the confession of a judgment to have been a transfer of the real estate of the defendant within the meaning of the bankruptcy law, and the averment of this fact, together with the averment of an intent to prefer, to have been the setting forth of a cause of bankruptcy under clause 2. There is involved as an essential ingredient the positive act of the debtor in the procurement of the judgment. The ruling under the facts there present covers a confessed judgment, but not an adverse one, and because of some expressions in the opinion carries the im-

plication that the ruling would not apply to any other than confessed judgments.

Another case (without the implication) to the same effect is supplied by In re Musgrove Mining Co. (D. C.) 37 Am. Bankr. Rep. 628, 234 Fed. 99. Judgments there had been confessed, but no executions had issued. It was conceded that no cause of bankruptcy under clause 3 existed. The judgments, however, were held to be transfers under clause 2, the averment appearing of an intent to prefer.

The trend of judicial opinion is therefore with the petitioners upon the main proposition advanced by them that a lien upon real estate, through which a sale can be effected, is a transfer within the meaning of clauses 1 and 2. We by no means regard the question as free from doubt, nor have we found the reasoning upon which the rulings were based to be in all respects convincing. They have, however, been made, and have so far been uniform. It seems, therefore, to us to be the wiser course to follow them until some commanding voice directs otherwise.

The ruling now made may properly be said to be an advance upon those cited, as in a sense it is. The space between the two classes of cases is, we think, well bridged by the averments of the petition. The act is directly charged to be the act of the alleged bankrupt. It is (according to the authorities quoted) a transfer. This transfer is averred to have been the act of the defendant in the judgment. We see in this respect no difference between the case of one debtor who, in order to defraud his creditors, appends his name to a judgment note upon which judgment is entered by the prothonotary and another who, in furtherance of a like fraudulent purpose, appends his signature to a plain promissory note, upon which is brought an action in which judgment is likewise recovered. The acts differ, of course, in form, but in intent and purpose and final results they are the same. The intent may be better concealed, and therefore more difficult to prove, in the one case than in the other, but we are dealing now with what the petitioners have averred, not with what they will be able to prove, and the act here is averred to have been the affirmative act of the defendant as positively as it could have been had the judgment been confessed. To hold there is no difference between a judgment and a transfer, if each was for an unlawful purpose, and yet balk at ignoring the difference in the mere form of the judgment, savors too much of straining at gnats while swallowing camels.

The motion to dismiss is denied.

GOLDEN HILL DISTILLING COMPANY v. LOGUE

243 Fed. 342, 156 C. C. A. 122

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917)

Shortly before judgment was taken and a levy made, as stated in the opinion, a receiver was appointed under the mortgage on the bankrupt's stock and fixtures, and a few days later the receiver was discharged on a motion in support of which affidavits were introduced tending to show that Hornstein was not insolvent, but that his assets were considerably in excess of his liabilities.

Hornstein conducted a saloon in Cleveland. The Distilling Company was his chief creditor, having control of a chattel mortgage which covered all his tangible assets, and having, also, an unsecured debt of about $1,200, represented by a cognovit note. Its manager, Bayer, was generally familiar with Hornstein's affairs. Hornstein's only asset, not covered by the chattel mortgage, was his license, which had a transfer value of $2,500. After certain proceedings, which need not be recounted, the Distilling Company took judgment on the cognovit note and caused the tangible property to be seized on the chattel mortgage and a levy to be made by the sheriff upon Hornstein's interest in the license. The sheriff thereupon advertised this interest for sale. After the notice had been running about two weeks, Hornstein's wife was appointed his guardian, upon the ground of his mental incompetency, and she thereupon filed, in the court where the judgment had been rendered, a motion to set it aside, and obtained a preliminary injunction against the sale. Her claim was that the debt had been paid. Upon this claim, there was a hearing upon the merits. The court decided that no part of the debt was successfully impeached, and denied the motion and dissolved the injunction. Thereupon, and on the same day, the sheriff sold the license to a third person, and paid over to the Distilling Company the $1,200. On the next day, a petition in bankruptcy was filed and the remainder of the license price was eventually turned over by the sheriff to the trustee in bankruptcy. The trustee filed, in the bankruptcy court, a petition against the Distilling Company, asking the recovery of this $1,200 as a preference, and asking, also, a judgment for the value of goods returned by Hornstein to the Distilling Company shortly before the collapse, alleging that this

return of goods was a preference. Upon the petition, summons was issued, the Distilling Company answered and the issue was tried before the District Judge (a jury having been duly waived), and he made findings of fact and law and entered judgment for the trustee for both amounts sued for. The Distilling Company brings error.

DENISON, Circuit Judge (after stating the facts as above).

* * * * * * * *

The Distilling Company next urges that the receipt by a plaintiff in execution of the amount of his judgment paid over to him by the sheriff from the proceeds of an execution sale, does not constitute a preference which is recoverable under section 60b. The argument is both that the judgment against Hornstein, after the exhaustion of the unsuccessful efforts made in his behalf, could no longer be said to have been "procured or suffered" by him, and that it is the intent of the section to legislate only against unsatisfied judgments without disturbing the status of the creditor who has, by execution sale, realized his judgment before bankruptcy petition filed. These two matters are sufficiently related to justify considering them together. We find no authoritative construction of the section in either particular, and we must determine its intent as best we may without such aid.

We find the subject of preference, resulting from legal proceedings, treated of by more or less similar language in at least three sections. Section 3, cl. (3), defining acts of bankruptcy, sections 60a and 60b, defining preferences and the right to recover them, and section 67c, providing for the dissolution of liens obtained in legal proceedings, all relate to the general purpose of securing equality among creditors and as against an effort of a creditor to collect by law on his own account. All three must be read together, and yet, it is quite impossible to bring them into detailed harmony. The preference, which is an act of bankruptcy, is only an execution levy or analogous lien which has been "suffered or permitted" to come into existence and which is allowed to continue until five days before the execution sale (Citizens' Bank v. Ravenna Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352); the judgments regulated by section 60 are those which the bankrupt "procured or suffered" to be entered against him; and the liens reached by section 67c are invalid only if the lien was "sought and permitted" with the intent to work a forbidden preference. In Wilson v. City Bank, 84 U. S. (17 Wall.) 473, 21 L. Ed. 723,

the court had to determine the validity, under the act of 1867 (14 Stat. 517, c. 176), of an execution lien existing in that form upon the property of the debtor at the time the petition in bankruptcy was filed, but it was necessary to consider both the provisions which defined an act of bankruptcy and those which permitted the recovery of a preference. The conclusions of the court were:

"(1) That something more than passive nonresistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defense to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the Bankrupt Act.

"(2) That the fact that the debtor under such circumstances does not file a petition in bankruptcy is not sufficient evidence of such preference or of intent to defeat the operation of the act.

"(3) That, although the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law.

"(4) That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition."

In Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, the act of 1898 was involved. The sole question to decide was whether the judgment shown by that record had been "suffered or permitted" within the meaning of clause (3) of section 3. The judgment had been entered and the execution levy made without the consent or knowledge of the debtor, but by virtue of a cognovit note. The majority of the court held that such a judgment was to be deemed "suffered or permitted" within the meaning of this section; there were four dissenting judges adopting the contrary view. The opinion of the majority was based largely, if not essentially, upon the idea that by changing the language "procured or suffered," found in the act of 1867, and construed by Wilson v. City Bank, into "suffered or permitted," Congress had indicated its purpose that the active intent of the debtor to evade the equality of the Bankruptcy Act should no longer be the criterion, and that, therefore, the giving or allowing to continue the cognovit note which put it out of the debtor's power to resist the entry of a

judgment when desired, was a sufficient suffering or permitting.[1] This decision is of no help in the present case, since section 60 retains the very language "procured or suffered" which was found in the act of 1867, and which, therefore, considered by itself, would bring the result of Wilson v. City Bank and not that of Wilson v. Nelson.

Turning, now, to the other branch of the contention, it must be conceded that there are, in sections 60a and 60b, no provisions which, in terms, reach the proceeds of a satisfied judgment, and that, since Wilson v. City Bank had ruled that under the act of 1867 the trustee could not recover such proceeds from the execution creditor, the clear expression of the contrary intent ought to be found in the act of 1898 before it should receive the contrary construction. It may also be said, according to the rule that things not specifically named in an enumeration are excluded, that the presence of provisions against the lien of a judgment and the omission of any mention of its proceeds raise a measure of presumption that the latter are not intended to be touched. The Supreme Court held, in Clarke v. Larremore, 188 U. S. 486, 490, 23 Sup. Ct. 363, 365 (47 L. Ed. 555), that where the proceeds of the execution sale were in the hands of the sheriff when the petition in bankruptcy was filed, the money should go to the trustee and not to the judgment creditor, but said:

"A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution and that which was done under them as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations."

Several District Court opinions have held that such an execution judgment lien is not invalidated by section 67f, but have declined to consider whether the proceeds of the sale could be recoverable under section 60b.[2]

1—The court here says, in the margin: "Wilson v. Nelson has been followed, if not extended, in Bradley Co. v. White (C. C. A. 5) 121 Fed. 779, 58 C. C. A. 55; Bogen v. Protter (C. C. A. 6) 129 Fed. 533, 64 C. C. A. 63; and Re Rung Co. (C. C. A. 2) 139 Fed. 526, 71 C. C. A. 342."

2—The court here cites, in the margin: Re Bailey (D. C.) 144 Fed. 214, 216; Re Resnek (D. C.) 167 Fed. 574; Nelson v. Svea Co. (D. C.) 178 Fed. 136, 140; Re Weitzel (D. C.) 191 Fed. 463.

Can the payment of the proceeds of execution sale be thought such a "transfer" as is contemplated by the section? The word "transfer" is given a broad meaning by the statutory definition. Section 1, cl. 25. A money payment is within this generality of definition. Pirie v. Chicago Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. There is surely a transfer by operation of law; the property goes to the purchaser and the proceeds to the creditor; yet, there has not been that voluntary action naturally implied from the use of the word "made" (by the bankrupt).[3]

It must be confessed that the application of section 60b to the situation which we have described as arising in this case is not clear and certain, and we suspect that there can be no construction of these and the other sections mentioned which will not develop some inconsistencies and conflicts; but we conclude that the key is furnished by the amendment of 1910. Prior to that time it had been essential, in order to recover a preference under this section, to show that the debtor had intended to accomplish a preference in violation of the act. It was consistent with this theory that collection against him by legal proceedings was not condemned, unless they were by his procurement, and that a transfer was not voidable unless it had been "made" by him. When the amendment of 1910 provided that the debtor's intent was no longer relevant, but that the transaction might be avoided if the creditor had reason to believe that he was thereby getting a larger percentage than other creditors would receive, it destroyed the reason for longer requiring this voluntary participation by the debtor. The principle of the decision found in the majority opinion in Wilson v. Nelson applies here; and since the intent and purpose of the debtor are made no longer important, the language used and that allowed to remain must be construed to effectuate this result, however far from apt the words may be.

When we consider the three sections first named, as well as section 67f, we conclude that the general purpose of the act, in its present form, can only be effectuated, and that inconsisten-

3—The court here says, in the margin: "Whether the receipt of money on execution is a transfer within this section has been considered in the District Court, but not decided, in a case where there was no collusion. Re Blair (D. C.) 102 Fed. 987; Re Knickerbocker (D. C.) 121 Fed. 1004; Re Bailey (D. C.) 144 Fed. 214, 216; Dreyer v. Kicklighter (D. C.) 228 Fed. 744, 752; Grant v. Bank (D. C.) 232 Fed. 201, 217."

cies and uncertainties are best reconciled and clarified, by holding that the creditor who recovers a judgment, by consent or in invitum, and by execution sale collects his money within four months preceding bankruptcy, and with reasonable cause to believe, etc., receives a voidable preference, which he must repay to the trustee.

The Distilling Company further contends that its agent, Bayer, had no sufficient reason to believe that the judgment or transfer would effect a preference, and this because he had no such reason to think Hornstein insolvent. The same reason is alone urged against the recovery for the goods returned on account. This presents only a question of fact. It is true that there had been a more or less formal judicial determination only a few days before that Hornstein was solvent; but this was, in no sense, res judicata, binding the creditors or the trustee, and the circumstances point strongly to the conclusion that Bayer must have reasonably anticipated that the assets were not enough to pay the debts. A review of the evidence pro and con would not be of value. It is enough to state our conclusion.

The judgment must be affirmed.

WILLIAMS v. UNITED STATES FIDELITY AND GUARANTY CO.

236 U. S. 549, 59 L. ed. 713, 35 Sup. Ct. 289

(United States Supreme Court. February 23, 1915)

Mr. Justice McREYNOLDS delivered the opinion of the court:

This cause presents the following question: Does a discharge in bankruptcy acquit an express obligation of the principal to indemnify his surety against loss by reason of their joint bond, conditioned to secure his faithful performance of a building contract broken prior to the bankruptcy, when the surety paid the consequent damage thereafter?

R. P. Williams and J. B. Carr, as partners, entered into a contract with certain school trustees—April, 1900—to construct a building in Florida; and, with defendant in error company as surety, gave a bond guaranteeing its faithful performance. Contemporaneously with the execution of the bond, and as a condition thereto, the partners made a written application to

the company, in which they obligated themselves "to indemnify the said United States Fidelity & Guaranty Company against all loss, costs, damages, charges, and expenses whatever, resulting from any act, default, or neglect of ours, that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof."

November 9, 1900, the partners abandoned the contract; the trustees took possession and completed the structure April 13, 1901, and on May 14 following they made adequate demands for payment of the amount expended beyond the contract price. This being refused, they brought suit and recovered a judgment against the company July 1, 1904, which it satisfied February 20, 1905, by paying $5,475.36.

Voluntary petitions were filed by partnership and members May 28, 1901, and all were immediately adjudged bankrupt. The schedules specified the building contract, its breach and the bond, and their adequacy is not now questioned. In due time the school trustees proved their claim and it was allowed. October 5, 1901, the petitioners received their discharges. No dividend was declared, all the assets being required for administration expenses.

Defendant in error brought suit in the city court of Atlanta against the firm and its members—August, 1911,—setting up the written promise made to it when the bond was executed, and asking judgment for the amount paid in satisfaction of the recovery thereon, together with attorneys' fees. The matter was submitted upon an agreed statement of facts, and judgment went in favor of the company; this was affirmed by the Court of Appeals of Georgia (11 Ga. App. 635), and the cause is here upon writ of error.

The state court treated the written contract of indemnity between the bankrupts and the surety company as the expression of what would have been implied, and declared: "The bankrupts owed the surety nothing at the time the petition in bankruptcy was filed, because the surety had paid nothing for their benefit, and the relation of debtor and creditor did not exist between them until after actual payment by the surety. * * * The surety had no claim against the bankrupts which it could file in its own name. * * * The liability to the surety by the bankrupts was altogether contingent and might never have arisen. Indeed, we hold that at the time the petition in bank-

ruptcy was filed the surety had no claim or debt against the bankrupt which could have been proved in the bankrupt court under § 63 of the bankrupt act."

Counsel for the company "contend that the claim at bar was subject to two contingencies, one of which, to wit, the sustaining or incurring of actual pecuniary loss, resultant to the principal's act, had not arisen at the time of the filing of the petition. Therefore said claim was not an unliquidated claim upon an express contract absolutely owing at the time. It was a contingent claim, and as such not provable, and therefore not affected by the bankrupt principal's discharge."

If the doctrine announced by the court below and maintained here by counsel is correct, a discharge in bankruptcy may have very small value for the luckless debtor who has faithfully tried to secure his creditors against loss; and, in effect, a demand against him may be kept alive indefinitely, according to the interest or caprice of his surety.

It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibility consequent upon business misfortunes. Wetmore v. Markoe, 196 U. S. 68, 77; Zavelo v. Reeves, 227 U. S. 625, 629; Burlingham v. Crouse, 228 U. S. 459, 473. And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent. Lau Ow Bew v. United States, 144 U. S. 47, 59; Re Chapman, 166 U. S. 661, 667.

The statute (30 Stat. 544), as amended in 1903 (32 Stat. 797), provides: Sec. 17. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations." Sec. 63. "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract, express or implied; * * * Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." Sec. 1. (11) "Debt shall include any debt, demand, or claim provable in bankruptcy." Sec. 2. Courts of bankruptcy have jurisdiction to "(6) bring in and substitute additional persons or parties in

proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." Sec. 57i. "Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor." General Order XXI—4. "The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt." Sec. 16. "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for a bankrupt, shall not be altered by the discharge of such bankrupt."

Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which, at the time of the bankruptcy, were fixed in amount or susceptible of liquidation. Dunbar v. Dunbar, 190 U. S. 340, 350; Crawford v. Burke, 195 U. S. 176, 187; Grant Shoe Co. v. Laird, 212 U. S. 445, 448; Zavelo v. Reeves, 227 U. S. 625, 631. It provides complete protection and an ample remedy in behalf of the surety upon any such obligation. He may pay it off and be subrogated to the rights of the creditor; if the creditor fails to present the claim for allowance against the estate, he may prove it; and in any event he has abundant power, by resort to the court or otherwise, to require application of its full *pro rata* part of the bankrupt's estate to the principal debt. To the extent of such distribution the obligation of the bankrupt to the surety will be satisfied. Although, unlike the act of 1867, the present one contains no express provision permitting proof of contingent claims, it does in substance afford the surety on a liability susceptible of liquidation the same relief possible under the earlier act, *i. e.*, application to the principal debt of all dividends declared out of the estate (act of 1867, §§ 19, 27, 14 Stat. 517, 525, 529). And as the surety thus either shares or enjoys an opportunity to share in the principal's estate, we

think the discharge of the latter acquits the obligation between them incident to the relationship. Mace v. Wells, 7 How. 272, 276; Fairbanks v. Lambert, 137 Mass. 373, 374; Hayer v. Comstock, 115 Iowa 187, 191; Post v. Losey, 111 Ind. 74, 80; Smith v. Wheeler, 55 App. Div. 170, 171.

It would be contrary to the basal spirit of the Bankrupt Law to permit a surety, by simply postponing compliance with his own promise in respect of a liability until after bankruptcy, to preserve a right of recovery over against his principal, notwithstanding the discharge would have extinguished this if the surety had promptly performed as he agreed. Such an interpretation would effectually defeat a fundamental purpose of the enactment.

The written indemnity agreement embodied in the bankrupt's application to the surety company for execution of the bond, so far as its terms are important here, but expressed what otherwise would have been implied from the relationship assumed by the parties. At the time of the bankruptcy, the obligation under this agreement was ancillary to a liability arising out of a contract, estimation of which was easy of establishment by proof. There was no uncertainty which could prevent the surety from obtaining all benefits to which it was justly entitled from the bankrupt estate.

Upon the facts presented we are of opinion that the discharge pleaded by the plaintiffs in error constituted a good defense, and the court below erred in holding otherwise. The judgment is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

CENTRAL TRUST COMPANY v. CHICAGO AUDITORIUM ASSOCIATION

240 U. S. 581, 60 L. ed. 811, 36 Sup. Ct. 412

(United States Supreme Court. April 3, 1916.)

Mr. Justice PITNEY delivered the opinion of the court:

On July 22, 1911, a creditors' petition in bankruptcy was filed against the Frank E. Scott Transfer Company, an Illinois corporation, and it was adjudged a bankrupt on August 7. The act of bankruptcy charged and adjudicated does not appear. When the proceedings were commenced, the bankrupt held con-

tract relations with the Chicago Auditorium Association under a written agreement made between them February 1, 1911, which had been partially performed. By its terms the Association granted to the Transfer Company, for a term of five years from the date of the contract, the baggage and livery privilege of the Auditorium Hotel, in the city of Chicago; that is to say, the sole and exclusive right, so far as it was within the legal capacity of the Association to grant the same, to transfer baggage and carry passengers to and from the hotel and to furnish livery to its guests and patrons. For the baggage privilege the Transfer Company agreed to pay to the Association the sum of $6,000, in monthly instalments of $100 each, and for the livery privilege the sum of $15,000, in monthly instalments of $250 each, and also agreed to furnish to the hotel and its guests and patrons prompt and efficient baggage and livery service at reasonable rates at all times during the continuance of the privileges. It was further agreed as follows:

"The party of the first part [Chicago Auditorium Association], however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so canceled and revoked.

"Said rights and concessions shall not be assignable without the express written consent of the party of the first part, nor shall the assignment of the same, with such written consent, relieve the party of the second part [Scott Transfer Company] from liability on the covenants and agreements of this instrument."

The contract authorized the Association, in the event of default by the Transfer Company in the payment of any instalment of money due, or in the performance of any other covenant, if continued for thirty days, to terminate the privileges at its option, without releasing the Transfer Company from liability upon its covenants. Should either or both of the privileges be

thus terminated before January 31, 1916, the Association was to be at liberty to sell the privileges, or make a new or different contract for the remainder of the term, but was not to be obliged to do this, and the Transfer Company, unless released in writing, was to remain liable for the entire amount agreed to be paid by it.

Up to the time of the bankruptcy this contract remained in force, and neither party had violated any of its covenants. The trustee in bankruptcy did not elect to assume its performance, and the Association entered into a contract with other parties for the performance of the baggage and livery service, and obtained therefrom the sum of $234.69 monthly as compensation for those privileges. On February 28, 1912, it exhibited its proof against the bankrupt estate, claiming an indebtedness of $6,537.94, of which $311.20 had accrued prior to the bankruptcy proceedings, and the remainder was claimed as unliquidated damages arising under the contract for alleged breach thereof on the part of the bankrupt through the bankruptcy proceedings. Of this amount $691.86 represented the loss incurred during the first six months of bankruptcy. Objections filed by the trustee were sustained by the referee, except as to that portion of the claim which had accrued prior to the bankruptcy proceedings. On review, the District Court sustained this decision. On appeal to the Circuit Court of Appeals, the order of the District Court was reversed, and the cause remanded with direction to allow $691.86 upon the claim, and to disallow the remaining portion. 216 Fed. 308.

An appeal to this court by the trustee in bankruptcy was allowed, under § 25b-2 of the Bankruptcy Act (of July 1, 1898, chap. 541, 30 Stat. 544, 553), upon a certificate by a justice of this court that the determination of the questions involved was essential to a uniform construction of the Act throughout the United States. This is No. 162. Thereafter a cross appeal by the Auditorium Association was allowed by one of the judges of the Circuit Court of Appeals. This is No. 174.

* * * * * * * *

Coming to the merits: It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the

damages occasioned by such anticipatory breach. The rule has its exceptions, but none that now concerns us. Roehm v. Horst, 178 U. S. 1, 18, 19. And see O'Neill v. Supreme Council, 70 N. J. L. 410, 412. There is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other Federal courts are in conflict. It was, however, held in Lovell v. St. Louis Life Ins. Co., 111 U. S. 264, 274, where a life insurance company became insolvent and transferred its assets to another company, that a policy holder was entitled to regard his contract as terminated and demand whatever damages he had sustained thereby. And see Carr v. Hamilton, 129 U. S. 252, 256. In support of the provability of the claim in controversy, Ex parte Pollard, 2 Low. 411, Fed. Cas. No. 11,252; Re Swift (C. C. A. 1st), 112 Fed. 315, 319, 321; Re Stern (C. C. A. 2d), 116 Fed. 604; Re Pettingill (D. C. Mass.), 137 Fed. 143, 146, 147; Re Neff (C. C. A. 6th), 157 Fed. 57, 61, are referred to; and see Pennsylvania Steel Co. v. New York City R. Co. (C. C. A. 2d), 198 Fed. 721, 736, 744. To the contrary, Re Imperial Brewing Co. (D. C. Mo.), 143 Fed. 579; Re Inman (D. C. Ga.), 171 Fed. 185, s. c. 175 Fed. 312; besides which a number of cases arising out of the relation of landlord and tenant are cited: Re Ells, 98 Fed. 967; Re Pennewell, 55 C. C. A. 571, 119 Fed. 139; Watson v. Merrill, 136 Fed. 359; Re Roth & Appel, 181 Fed. 667; Colman Co. v. Withoft, 195 Fed. 250. Cases of the latter class are distinguishable because of the "diversity betweene duties which touch the realty, and the meere personalty." Co. Litt. 292, b. § 513.

The contract with which we have to deal was not a contract of personal service simply, but was of such a nature as evidently to require a considerable amount of capital, in the shape of equipment, etc., for its proper performance by the Transfer Company. The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. It may be conceded that the contract was assignable, and passed to the trustee under § 70a (30 Stat. 565), to the extent that it had an option to perform it in the place of the bankrupt (see Sparhawk v. Yerkes, 142 U. S. 1, 13; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 322); for although there was a stipulation against

assignment without consent of the Auditorium Association, it may be assumed that this did not prevent an assignment by operation of law. Still, the trustee in bankruptcy did not elect to assume performance, and so the matter is left as if the law had conferred no such election.

It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors. This view was taken, with respect to the effect of a state proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a receiver, and dissolving the corporation, in People v. Globe Ins. Co., 91 N. Y. 174, cited with approval in some of the Federal court decisions above referred to. In that case, it did not appear that the company was the responsible cause of the action of the State, so as to make the dissolution its own act; but, irrespective of this, we cannot accept the reasoning. As was said in Roehm v. Horst, 178 U. S. 1, 19: "The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due." Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. Williams v. United States Fidelity Co., 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from

participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement within the doctrine of Roehm v. Horst, supra.

The claim for damages by reason of such a breach is "founded upon a contract, express or implied," within the meaning of § 63a-4, and the damages may be liquidated under § 63b. Grant Shoe Co. v. Laird, 212 U. S. 445, 448. It is true that in Zavelo v. Reeves, 227 U. S. 625, 631, we held that the debts provable under § 63a-4 include only such as existed at the time of the filing of the petition. But we agree with what was said in Ex parte Pollard, 2 Low. 411, Fed. Cas. No. 11,252, that it would be "an unnecessary and false nicety" to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition. And as was also declared in In re Pettingill, 137 Fed. 143, 147: "The test of provability under the Act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under § 63b (30 Stat. 562)." It was in effect so ruled by this court in Lesser v. Gray, 236 U. S. 70, 75, where it was said: "If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge." Of course, he could not be released unless the debt was provable.

We therefore conclude that the Circuit Court of Appeals was correct in holding that the intervention of bankruptcy constituted such a breach of the contract in question as entitled the Auditorium Association to prove its claim. * * * * * *

COHEN v. SAMUELS

245 U. S. 50, 62 L. ed. 143, 38 Sup. Ct. 36

(United States Supreme Court. November 5, 1917)

Mr. Justice McKENNA delivered the opinion of the court.

On May 13, 1915, Elias W. Samuels filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. On the same day Cohen, petitioner herein, was duly elected his trustee. Samuels at the time of the adjudication held five life insurance policies in various life insurance companies.

On September 16, 1915, Cohen made motions before the referee in bankruptcy to require Samuels to deliver to him, Cohen, the policies or pay to him the cash surrender value of them as of the date of the adjudication. The motions were denied.

Subsequently Cohen filed petitions to review the rulings of the referee as to three of the policies, which petitions came on for hearing before the United States District Court for the Southern District of New York February 14, 1916.

The policies were respectively for the sums of $3,000, $3,000, and $1,000, and had respectively a cash surrender value of $193.85, $753, subject to a deduction of a loan of $555 and interest, and $396. The policies were payable to certain relatives of Samuels as beneficiaries and it was provided in each that Samuels reserved the absolute right to change the beneficiary without the latter's consent.

The District Court affirmed the orders of the referee, following what the court conceived to be the ruling in In re Hammel & Co., 221 Fed. 56.

Cohen petitioned the Circuit Court of Appeals to revise the ruling of the District Court as provided in § 24b of the Bankruptcy Act and for such other and further relief as might be proper.

The Circuit Court of Appeals affirmed the ruling of the District Court, one judge dissenting. 237 Fed. 796.

The facts are not in dispute. The policies had a cash surrender value at the time Samuels was adjudicated a bankrupt which the companies were willing to pay to him and in all of them he had the absolute right to change the beneficiaries.

The question in the case is the simple one of the construction of § 70a. By it the trustee of the bankrupt is vested by operation of law with title to all property of the bankrupt

which is not exempt; "(3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; * * * (5) property which prior to the filing of his petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. * * *"

Regarding the section in its entirety there would seem to be no difficulty in its interpretation, but we are admonished by the decision of the Circuit Court of Appeals and its reasoning and also by the argument of counsel that there are considerations which give particular control to the proviso and distinguish between insurance policies and other property which the bankrupt can transfer or which can be levied upon and sold under judicial process against him (subdivision 5). We have given attention to those considerations and feel their strength, but they are opposed by other considerations. It might indeed be that it would better fulfill the protection of insurance by considering the proviso alone and literally, regarding the policy at the moment of adjudication, and, if it be not payable then in words to the bankrupt—no matter what rights or powers are reserved by him, no matter what its pecuniary facility and value is to him—to consider that he has no property in it. But we think such construction is untenable. The declaration of subdivision 3 is that "powers which he might have exercised for his own benefit" "shall in turn be vested" in the trustee, and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true the policies in question here are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance

policy a shelter for valuable assets and, it might be, a refuge for fraud. And our conclusions would be the same if we regarded the proviso alone.

This court has been careful to define the interest of bankrupts in the insurance policies they may possess. In Hiscock v. Mertens, 205 U. S. 202, we gave a bankrupt the benefit of the redemption of a policy from the claims of creditors, though a cash surrender value was not provided by it but was recognized by the insurance company. In Burlingham v. Crouse, 228 U. S. 459, 473, we said that it "was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance." See also Everett v. Judson, 228 U. S. 474. Judgment of the Circuit Court of Appeals affirming the order of the District Court is reversed and the case remanded to the District Court for further proceedings in accordance with this opinion. Reversed.

AMERICAN TRUST & SAVINGS BANK v. DUNCAN

254 Fed. 780, 166 C. C. A. 226

(Circuit Court of Appeals, Fifth Circuit. December 16, 1918)

WALKER, Circuit Judge. The appellee, as trustee in bankruptcy of George E. Lum, filed a bill in the Chancery Court of Jefferson county, Ala., against the bankrupt and his wife, Carrie E. Lum, alleging that about nine years prior to the bankruptcy certain described real estate was conveyed to the bankrupt's wife, part of the purchase money for which and part of the cost of valuable improvements thereon were paid with the bankrupt's money, as a mere gift to his wife, while he was indebted to the American Trust & Savings Bank (hereinafter referred to as the appellant) in a considerable sum, $1,000 of which remained unpaid when the bill was filed. The bill prayed that the real estate mentioned, with the improvements thereon, be subjected to the payment of the debts of the bankrupt, that the real estate and improvements be sold for that purpose, and the proceeds thereof be paid to the trustee in bankruptcy, and for general relief. That suit resulted in the rendition of a judgment or decree of the Supreme Court of Alabama which adjudged that the real estate mentioned be subjected to the satisfaction of the claim of the appellant to the extent of $1,000 and accrued interest, declar-

ing and establishing a lien upon said real estate to said extent, and that unless said amount is paid into court within sixty days said real estate be advertised and sold for the satisfaction of said indebtedness. Pursuant to that decree the sum of $1,000, with accrued interest, was paid to the trustee in bankruptcy. Thereafter the appellant filed in the bankruptcy proceedings its petition, alleging the facts above set out, and that the petitioner was the only creditor of the bankrupt whose debt was in existence at the time the bankrupt made the alleged gifts to his wife, and praying that the trustee be ordered and directed to pay over to the petitioner the said sum of $1,000 and accrued interest, less the costs and expenses of said suit and of the court in which the petition was filed. The referee made an order denying the prayer of the petition, "but without in any manner affecting the proof and allowance of the claim of the said petitioner, American Trust & Savings Bank, filed and allowed in this proceeding as an unsecured claim not entitled to preference or priority of payment." The appellant's petition for the review of the referee's order was dismissed by the District Court. The appeal is from the decree to that effect.

The right of the trustee to bring and maintain the above-mentioned suit existed by virtue of the following provision of the bankruptcy act:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Bankruptcy Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 (Comp. St. § 9654).

The decree rendered enforced the right of the sole remaining creditor whose debt was in existence at the time the debtor made the donation of money to his wife, or for her benefit, to have that money treated as received by the donee in trust for such creditor, and to have the amount of the donation, or so much thereof as was required to satisfy the demand of such creditor, charged against the property of the donee in which it was invested. Lock-

ard v. Nash, Adm'r, 64 Ala. 385; Cartwright v. West, 185 Ala. 41, 64 South. 293. The questioned transaction was binding as between the debtor and his donee, the former retaining no right to the money he gave and acquiring no interest in the property into which it went, but was voidable as against creditors whose debts were in existence when the gift was made. An effect of the statute is to give the debtor's trustee in bankruptcy the right to assert and enforce the right of such creditors. The appellant's petition raised the question whether the amount recovered by the trustee, less costs incurred, belonged to the creditor whose right was enforced by the decree, or was received and held by the trustee as part of the bankrupt's estate for the common benefit of his creditors. Other creditors would be benefited by the trustee's recovery, though the net amount recovered is applied on the appellant's demand alone, as a result of such application is the extinguishment of a claim which, but for such recovery, would share in the part of the bankrupt's estate which is available for general distribution among his creditors. Nothing contained in the above-quoted provision of the bankruptcy act forbids the application of an amount so recovered by the trustee to the satisfaction of the one debt of the bankrupt which was in existence when the transaction brought into question by the trustee's suit occurred. That suit being the assertion by the trustee of a right possessed by only one of the bankrupt's creditors, other creditors have no right to share in the amount so recovered, unless that right is given by some provision of the bankruptcy act. In behalf of the appellee it is contended that the decision in the case of Globe Bank v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, shows that the amount recovered by the trustee was held by him as a part of the bankrupt's estate to which the appellant has no prior right.

The fund which was in question in the case just mentioned was acquired by the trustee in bankruptcy under the following circumstances: Some time prior to the debtor's bankruptcy, and while he owed debts to the Globe Bank and others, he made voluntary conveyances to his son. Within four months prior to the bankruptcy, creditors whose debts existed at the time such conveyances were made brought suits to subject the conveyed property to their demands and had attachments levied on that property. After the debtor was adjudged bankrupt, the Bankruptcy Court entered an order that the attachment lien be preserved for the benefit of the bankrupt estate, and that the trustee inter-

vene in the suits in which the attachments issued. This the trustee did by petition, and it was adjudged that enough of the attached property be sold to realize the amount of the debts in existence when the attacked conveyances were made. The trustee received the proceeds of such sale. It was held that the fund so obtained should be distributed between all the creditors as a general asset of the bankrupt estate, and not between those creditors who alone would have shared in the fund, had their attachment been obtained more than four months prior to the filing of the petition in bankruptcy. The opinion rendered makes it plain that the conclusion reached was the result of applying the provisions of section 67f of the bankruptcy act to the facts disclosed. In the course of the opinion it was said:

"That section distinctly provides that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, within four months of the filing of the petition in bankruptcy, shall be deemed null and void, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, as was done in this case, order that the right under the levy, judgment, attachment or other lien be preserved for the benefit of the estate in which event the same shall pass to and be preserved by the trustee for the benefit of the estate. Except for the attachments, the appellant banks had no specific lien upon the estate." Globe Bank v. Martin, 236 U. S. 288, 298, 35 Sup. Ct. 377, 381 (59 L. Ed. 583).

The ruling was to the effect that, where a judicial lien obtained against an insolvent debtor within four months prior to the filing of the petition in bankruptcy against him is preserved and enforced for the benefit of the estate, as authorized by section 67f of the bankruptcy act, the fund coming into possession of the trustee as the result of such action belongs to the bankrupt estate, and not to those creditors only in whose behalf the lien originally was obtained. That decision was the result of applying the provision mentioned to a state of facts to which it was held to be applicable.

Section 70e of the bankruptcy act differs from section 67f of that act, in that the former does not contain any provision to the effect that property, or its value, recovered by the trustee in a suit which that section authorizes him to bring when he elects

to avoid a transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, shall "pass to the trustee as part of the estate of the bankrupt." It may be that property or its value so recovered by his trustee might have been made a part of the bankrupt's estate, not subject to any priority in favor of the creditor or creditors who alone had had the right to avoid the transfer brought into question. But it is significant that the statute does not so provide, while it does provide for the passing to the trustee, as a part of the estate of the bankrupt, of property, or its value, acquired by him as a result of the preservation and enforcement of a lien obtained through legal proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy against him, without making any exception based upon the circumstance that the lien so preserved and enforced was obtained by a creditor or creditors who alone had the right to obtain it; the right being one not possessed by other creditors. The statute gives notice to any one obtaining a lien by legal proceedings against an insolvent person that, if the insolvent's bankruptcy occurs within four months after the lien is obtained, it may be preserved and enforced for the benefit of the bankrupt's estate, the proceeds of such enforcement to pass to the trustee as part of the estate of the bankrupt. The provision having this effect deals with "levies, judgments, attachments, or other liens" obtained through legal proceedings against an insolvent within four months prior to his bankruptcy, and with property affected by a lien so obtained. It does not deal with the rights of creditors who have not so obtained a lien.

Under the circumstances disclosed in the instant case the appellant alone had the right to subject to the satisfaction of its demand against the bankrupt the property of the bankrupt's donee in which the sum donated was invested. The appellant had not obtained any lien through legal proceedings instituted for the enforcement of such right. There has not been called to our attention, and we have not discovered, any provision of the bankruptcy act indicating an intention to treat as a general asset of the bankrupt's estate an amount recovered by the trustee in a suit brought by him, as authorized by section 70e of that act, for the enforcement of the right possessed by a creditor situated as the appellant was. As above pointed out, it does not follow from the fact that the trustee was authorized to bring and maintain such a suit that the recovery in it is to be distributed be-

tween all the creditors as a general asset of the bankrupt's estate, as other creditors may be benefited by the recovery—though it belongs to the one creditor whose right the trustee asserted—having the effect of extinguishing a claim against the general assets of the bankrupt's estate, thereby increasing the pro rata shares of other creditors in the assets to be distributed between them.

In view of the differences above pointed out between section 67f and section 70e of the bankruptcy act, and of the absence of anything indicating that the lawmakers intended that a debtor's bankruptcy should have the effect of impairing rights possessed by one or some only of his creditors who had not, prior to the bankruptcy, obtained any lien through legal proceedings, we conclude that the decision last above cited does not foreclose the question raised by the facts of the instant case; that the proceeds realized from the suit brought to enforce the demand of the appellant against property not liable to be subjected to the demands of any other existing creditor of the bankrupt did not pass to the trustee as a part of the estate of the bankrupt, though the recovery was in a suit brought by the trustee under the authority conferred by section 70e of the bankruptcy act; and that the appellant was entitled to the net amount of the fund so realized.

It follows that the decree appealed from was erroneous. That decree is reversed.

McINTYRE v. KAVANAUGH

242 U. S. 138, 61 L. ed. 205, 37 Sup. Ct. 38

(United States Supreme Court. December 4, 1916)

Mr. Justice McREYNOLDS delivered the opinion of the court:

Plaintiff in error was a member of T. A. McIntyre & Company, engaged in business as brokers. During February, 1908, the partnership received certain stock certificates owned by defendant in error, and undertook to hold them as security for his indebtedness, amounting to less than one sixth of their market value. Within a few weeks, without authority and without his knowledge, they sold the stocks and appropriated the avails to their own use. Shortly thereafter both firm and its members were adjudged bankrupts. After his discharge in bankruptcy

this suit was instituted against plaintiff in error, seeking damages for the wrongful conversion. He set up his discharge and also personal ignorance of and nonparticipation in any tortious act.

The trial court held the liability was for wilful and malicious injury to property and expressly excluded from release by § 17 (2), Bankruptcy Act, as amended in 1903, and that the several partners were liable. A judgment for damages was affirmed by Appellate Division, 128 App. Div. 722, and Court of Appeals, 210 N. Y. 175.

That partners are individually responsible for torts by a firm when acting within the general scope of its business, whether they personally participate therein or not, we regard as entirely clear. Castle v. Bullard, 23 How. 172; Matter of Peck, 206 N. Y. 55. If, under the circumstances here presented, the firm inflicted a wilful and malicious injury to property, of course, plaintiff in error incurred liability for that character of wrong.

As originally enacted, § 17 of the Bankruptcy Act provided:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; * * * (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

This was amended by Act February 5, 1903, so as to read:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The trial court found—

That on February 5, 1908, McIntyre & Company by agreement obtained possession of Kavanaugh's stocks, worth approximately $25,000. and held them as security for his indebtedness, amounting to $3,853.32.

"That almost immediately after taking over said stocks by

certificates as aforesaid by said firm of T. A. McIntyre & Company, composed as aforesaid, and commencing on the very next day, said firm of T. A. McIntyre & Company (the above-named defendants being members thereof), without any notice to the plaintiff, and without his authority, knowledge, or consent, or demand of any kind upon him, sold and disposed of the identical certificates of such stock and scrip so turned over to them as aforesaid, and placed the avails thereof in the bank account of said firm of T. A. McIntyre & Company to the credit of said firm.

"That the various stocks aforesaid had all been disposed of prior to the 18th day of March, 1908, and that three quarters in value thereof had been disposed of on or prior to February 14th, 1908, or within nine days after the acquisition of the possession thereof by defendant's firm as aforesaid.

"That the above-named defendants, together with the other members of said firm of T. A. McIntyre & Company, in disposing of said stocks aforesaid, without notice to or demand upon the plaintiff, and without his authority, knowledge, or consent, and in depositing the proceeds and avails thereof in the bank account to the credit of said firm of T. A. McIntyre & Company, committed wilful and malicious injury to the property of the plaintiff.

"That on April 23rd, 1908, the said firm of T. A. McIntyre & Company filed a petition in bankruptcy in the United States District Court for the Southern District of New York, and were afterwards adjudicated bankrupts.

"That thereafter the plaintiff in this action proved his claim against the bankrupt estate without waiving any legal rights in this action or otherwise."

To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptation of the words. Bouvier's Law Dictionary—"Injury." And this we understand is not controverted; but the argument is that an examination of our several Bankruptcy Acts and consideration of purpose and history of the 1903 amendment will show Congress never intended the words in question to include conversion. We can find no sufficient reason for such a narrow construction. And instead of subserving the fundamental purposes of the statute, it would rather tend to bring about unfortunate if not irrational results. Why, for example, should a bankrupt who had stolen a watch

escape payment of damages, but remain obligated for one maliciously broken? To exclude from discharge the liability arising from such transactions as those involved in Crawford v. Burke, 195 U. S. 176, and here presented, not improbably was a special purpose of the amendment.

In Tinker v. Colwell, 193 U. S. 473, 485, 487, we said of original § 17(2): "In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained." And further: "A wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. Commonwealth v. Williams, 110 Mass. 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged."

The circumstances disclosed suffice to show a wilful and malicious injury to property for which plaintiff in error became and remains liable to respond in damages. The judgment below is affirmed.

1917 AMENDMENT OF THE BANKRUPTCY LAW

THE ACT OF MARCH 2, 1917, CH. 153 (39 Stat. at L. 999; 1918 Supp. Fed. Stat. Annot. 69) adds to § 17, after the words, "seduction of an unmarried female," the following: *"or for breach of promise of marriage accompanied by seduction."*

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